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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE EDWARD M. CHEN

IN RE: TESLA SECURITIES LITIGATION,	CASE NO. 18-CV-04865 EMC
	SAN FRANCISCO, CALIFORNIA
	VIA ZOOM VIDEOCONFERENCE
	THURSDAY, JULY 28, 2022

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF AND THE CLASS

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REPORTED BY: JOAN MARIE COLUMBINI, CSR #5435, RPR
PRO TEM OFFICIAL COURT REPORTER, USDC

THURSDAY, JULY 28, 2022 1:30 P.M.

THE CLERK: THE COURT WILL BE CALLING THE CASE: IN REGARDING TESLA, INC., SECURITIES LITIGATION, CIVIL ACTION 18-4865.

COUNSEL, PLEASE STATE YOUR APPEARANCE FOR THE RECORD, BEGINNING WITH THE PLAINTIFF.

MR. PORRITT: GOOD AFTERNOON, YOUR HONOR. NICHOLAS PORRITT OF LEVI AND KORSINSKY FOR THE PLAINTIFF AND THE CLASS, AND WITH ME IS ADAM APTON.

THE COURT: ALL RIGHT. GOOD AFTERNOON, MR. PORRITT.

MR. LIFRAK: GOOD AFTERNOON, YOUR HONOR. THIS IS MICHAEL LIFRAK APPEARING FOR THE DEFENDANTS. WITH ME TODAY, ARGUING THE MOTIONS, IS ANDREW ROSSMAN AND ELLYDE THOMPSON. MR. SPIRO IS ALSO ON THE ZOOM, BUT NOT ON CAMERA BECAUSE HE WON'T BE ARGUING ANY OF THE MOTIONS THAT ARE PENDING.

THE COURT: ALL RIGHT. THANK YOU, MR. LIFRAK AND COMPANY.

ALL RIGHT. SO WE'VE GOT FOUR MOTIONS. I WANT TO SPEND MOST OF THE TIME ON THE DAUBERT MOTION, BUT LET ME JUST BRIEFLY ASK A COUPLE OF QUESTIONS ABOUT THE OTHER ONES.

SO THE PLAINTIFF'S FIRST MOTION ASKING THAT MATERIALITY BE SOMETHING THAT'S DEEMED AND THAT NO REASONABLE JUROR COULD FIND THE STATEMENTS IMMATERIAL. AS YOU KNOW, I'VE ALREADY CLARIFIED THAT I FOUND A DIFFERENCE. THERE'S A

DEFERENCE BETWEEN FALSITY AND MATERIALITY. THOSE ARE TWO DIFFERENT THINGS. AND MATERIALITY IS TYPICALLY A QUESTION OF FACT. AND HERE THERE'S, FOR INSTANCE, A QUESTION ABOUT WHETHER OR NOT THE PRICES -- CHANGE IN PRICES OF STOCK WERE ATTRIBUTABLE TO THE -- THAT PART OF THE ANNOUNCEMENT THAT MR. MUSK WAS INTENDING TO TAKE TESLA PRIVATE AT 420, OR WAS IT ATTRIBUTABLE IN PART TO THE FUNDING SECURED. OBVIOUSLY, THERE'S SOME DISPUTE, THE EXPERT STUFF ABOUT CAUSATION AND EVERYTHING ELSE, BUT ALL SEEMS TO ME TO SUGGEST THAT THESE ARE FACTUAL ISSUES THAT WILL HAVE TO BE RESOLVED IN A TRIAL.

I HAVE A QUESTION FOR THE DEFENDANTS, AND THAT IS, YOUR EXPERT SEEMS TO CONCEDE THAT THE TWO STATEMENTS, THE TRUE PART AND THE FALSE PART, ARE KIND OF INSEPARABLE, OR THAT HE WOULD HAVE A HARD TIME TRYING TO PARSE THOSE OUT AND DISAGGREGATE THOSE.

IF THAT'S THE CASE, CAN YOU ALSO TAKE THE POSITION THAT THEY ARE SEGREGABLE AND THAT THERE'S MATERIALITY THAT YOU CAN ATTRIBUTE -- YOU CAN DETERMINE MATERIALITY BY ATTRIBUTING CAUSAL FORCE TO ONE AND NOT THE OTHER? I'M A LITTLE CONFUSED. CAN YOU -- ARE THEY TIED TOGETHER INEXTRICABLY OR YOU CAN'T DISCERN OR ARE THEY --

MS. THOMPSON: YOUR HONOR, ELLYDE THOMPSON, QUINN EMANUEL, FOR THE DEFENDANTS.

AS TO THAT QUESTION, TWO POINTS. FIRST, AS STATED ON PAGE 4 OF OUR OPPOSITION BRIEF, PLAINTIFF HAS MISCHARACTERIZED

PROFESSOR FISCHEL'S TESTIMONY. THE TESTIMONY AS TO MATERIALITY REALLY WAS AS TO THE AUGUST 7TH TWEETS AS A WHOLE, INCLUDING THE INDISPUTABLY TRUE STATEMENT REGARDING TAKING TESLA PRIVATE.

AS TO HOW THAT RELATES TO LOSS CAUSATION, CERTAINLY, THERE MAY BE A DEBATE ABOUT THE PROPER STANDARD FOR LOSS CAUSATION IN THE JURY INSTRUCTIONS, BUT THAT'S NOT A BASIS FOR INCLUDING EVIDENCE UNDER RULE 403. CERTAINLY, THERE IS EVIDENCE THAT -- PARTICULARLY, THE BLOG POST ON AUGUST 13TH WHICH RELATED TO THE CORRECTIVE DISCLOSURE AS TO FUNDING SECURED, THOSE PARTS OF THE AUGUST 7TH TWEETS WERE NOT DIRECTLY LINKED TO ANY LOSS THAT PLAINTIFF MAY CLAIM.

SO THERE IS RELEVANT PROBATIVE EVIDENCE AS TO LOSS CAUSATION THAT SHOWS THAT THERE'S, YOU KNOW, AN ABSENCE OF A CAUSAL CONNECTION BETWEEN THE MATERIAL MISSTATEMENTS THAT PLAINTIFFS ALLEGE AND THE LOSS THAT THEY CLAIM, AND THOSE, OF COURSE, ARE QUESTIONS THAT GO TO THE JURY. PROFESSOR FISCHEL'S TESTIMONY DOES NOT CHANGE ANYTHING ABOUT THAT.

THE COURT: ALL RIGHT. WELL, IT KIND OF GOES BACK TO YOUR EARLIER POINT, THAT THERE'S SOME EVIDENCE THAT -- AND THERE'S A DISPUTE ABOUT WHETHER THE AUGUST 13TH WAS TRULY A CORRECTIVE DISCLOSURE OR NOT, BUT ASSUMING THE JURY FINDS IT WAS, I TAKE IT YOUR ARGUMENT THAT NO OBVIOUS IMPACT ON PRICING DEMONSTRATES IT WASN'T MATERIAL.

MS. THOMPSON: THAT'S CORRECT YOUR HONOR. YES, THAT'S THE *ANTHEM* POINT. THE SUPREME COURT HAS SAID WHEN

THERE'S NO STOCK PRICE MOVEMENT, THAT MEANS THE ALLEGED MISREPRESENTATION WAS IMMATERIAL.

THE COURT: ALL RIGHT. AND I UNDERSTAND THERE'S THE KIND OF ARGUMENT THAT, WELL, THE AUGUST 13TH WAS HARDLY A FULL AND ROBUST DISCLOSURE, ET CETERA, ET CETERA, AND THERE'S OTHER EVIDENCE. SO ALL THAT SEEMS TO ME TO SUGGEST THAT THIS IS A QUESTION OF FACT. AND SO THAT WAS MY VIEW ORIGINALLY, AND IT REMAINS TO BE MY VIEW.

SO THAT'S -- THAT'S MY CONCLUSION WITH RESPECT TO THAT.

WITH RESPECT TO TESLA'S MOTION IN LIMINE TO EXCLUDE DAMAGES, EVIDENCE OF DAMAGES, AFTER AUGUST 13TH, THAT HINGES ON LARGE PART ON WHETHER THE AUGUST 17TH, OR THE MIDNIGHT.COM DISCLOSURE, OR PUBLICATION OF THE NEW YORK TIMES PIECE, MIDNIGHT AUGUST 16TH, PRINT BY AUGUST 17TH, HAD ANY ANYTHING NEW TO DISCLOSE, AND THERE'S A DISPUTE ABOUT THAT. AND I THINK THERE'S A GOOD ARGUMENT THAT IT ADDED SOME CORRECTIVE INFORMATION IN MAKING THINGS CLEAR IN TERMS OF WHAT WAS THE STATUS WITH RESPECT TO THE POTENTIAL SECURITY OF FUNDING.

AND SO THAT'S AN ISSUE THAT IS GOING TO HAVE TO BE DECIDED AND LOOKED AT BY THE JURY. AND, TO THE EXTENT IT HAD ANY CORRECTIVE POWER, ANY ATTEMPT TO SORT OF CUT OFF ANY DAMAGES PERIOD TO AUGUST 13TH, AS A MATTER OF LAW, I DON'T SEE THAT HERE.

SO I'M DETERMINING THAT I'M REJECTING THAT MOTION IN

LIMINE, AND I'M GOING TO ALLOW EVIDENCE POST-AUGUST 13. THAT WILL INFORM, OF COURSE THE EXPERT STUFF WE'RE GOING TO TALK ABOUT.

BEFORE WE GET TO THE EXPERT, THE LAST THING IS THE DEFENDANT'S MOTION IN LIMINE NUMBER 3 TO PRECLUDE THE UNPLED AUGUST 13 REPORTED MISREPRESENTATIONS, SORT OF THE FOURTH STATEMENT. AND THERE, YOU KNOW, TO ME, I DID SET A DEADLINE OF JULY 31ST, 2020, AS THE LAST DAY TO AMEND PLEADINGS, AND THE SIGNIFICANCE OF THAT IS THAT THAT, I THINK, BRINGS RULE 16 INTO PLAY, AND THERE HAS TO BE GOOD CAUSE. AND EVEN IF THERE WAS GOOD CAUSE FOR NOT PLEADING IT ORIGINALLY, THERE WAS A SIGNIFICANT DELAY IN BRINGING THIS MATTER INTO PLAY INTO THESE PROCEEDINGS. I THINK A DELAY OF SOME 15 MONTHS.

AND SO THE POINT OF RULE 16 IS DUE DILIGENCE. AND I DON'T SEE HOW THAT DUE DILIGENCE IS MET HERE. I MEAN, I'LL GIVE THE PLAINTIFFS A CHANCE TO RESPOND, BUT I'M VERY MUCH INCLINED TO SAY THAT'S NOT GOING TO BE ALLOWED.

MR. PORRITT: YOUR HONOR, IF I MAY, I WOULD JUST LIKE -- I'M STRUGGLING A LITTLE BIT. IF YOU COULD CLARIFY EXACTLY THE SCOPE OF THE RULING HERE, BECAUSE THE ENTIRE AUGUST 13TH BLOG POST WAS PLEADED IN THE COMPLAINT, AND WAS PLEADED TO BE MISLEADING IN THE COMPLAINT.

THE COURT: YEAH, BUT THIS, YOU GOT TO DO IT STATEMENT BY STATEMENT. THAT'S THE WHOLE POINT OF PSLRA -- YOU KNOW, WE WENT THROUGH THIS WHOLE THING, AND I HAVE TO GO

THROUGH THIS WHOLE CRUCIBLE EVERY TIME WE HAVE ONE OF THESE CASES OF LINE BY LINE, FACT BY FACT, WAS THERE FALSITY, WAS THERE SCIENTER, WAS THERE -- YOU KNOW. SO THAT'S THE PURPOSE OF THE SPECIFICITY OF PLEADING, AND THAT WASN'T DONE WITH THIS PARTICULAR STATEMENT.

MR. PORRITT: AGAIN, I WAS JUST -- ON THE DEFENDANT'S MOTION, I WANT TO CLARIFY EXACTLY WHICH OF THE STATEMENTS THEY ARE -- YOUR HONOR IS RULING ON JUST SO WE HAVE CLARITY GOING FORWARD.

THE COURT: ALL RIGHT. LET'S MAKE SURE. THAT'S A FAIR STATEMENT.

I THOUGHT WHAT WAS AT ISSUE WAS THE STATEMENT FROM THE BLOG, THE STATEMENT THAT SAID:

> "I HAVE CONTINUED TO COMMUNICATE WITH THE MANAGING DIRECTOR OF THE SAUDI FUND HIS EXPRESS SUPPORT FOR PROCEEDING SUBJECT TO FINANCIAL AND OTHER DUE DILIGENCE AND INTERNAL REVIEW PROCESSES FOR OBTAINING APPROVALS. HE ALSO ASKED FOR ADDITIONAL DETAILS ON HOW THE COMPANY WOULD BE TAKEN PRIVATE, INCLUDING ANY REQUIRED PERCENTAGES AND ANY REGULATORY REQUIREMENTS."

I THOUGHT THAT WAS ONE AT ISSUE. AM I MISTAKEN? LET ME ASK THE DEFENDANTS THAT.

MR. LIFRAK: YES, YOUR HONOR. MICHAEL LIFRAK FOR THE

DEFENDANTS. THAT IS THE STATEMENT THAT WE PUT AT ISSUE IN THE MOTION IN LIMINE, BECAUSE THAT WAS THE STATEMENT THAT THE PLAINTIFF MOVED FOR SUMMARY JUDGMENT ON AND THAT WE KNEW, BECAUSE OF THAT, THEY NOW INTEND TO GO TO THE JURY ON THIS ALLEGED MISSTATEMENT.

THE ISSUE, THOUGH, IS THAT IN THE OPPOSITION TO THE MOTION IN LIMINE, PLAINTIFF IDENTIFIED EVEN MORE STATEMENTS FROM THE AUGUST 13TH MEMO THAT ALSO WERE NOT UNPLED THAT, APPARENTLY, NOW THE PLAINTIFF INTENDS TO GO TO THE JURY ON IT. SO THE SCOPE OF THE MOTION IS TO PRECLUDE THE PLAINTIFF FROM GOING TO TRIAL ON ANY ALLEGED MISSTATEMENT THAT WAS NOT PLED AND NOT SPECIFICALLY IDENTIFIED IN THE DISCOVERY RESPONSES.

THE EXAMPLE THAT WE GAVE IN THE MOTION WAS WHAT YOUR HONOR JUST READ, BUT NOW PLAINTIFF IS COMING UP WITH MORE UNPLED ACCUSATIONS, ALLEGED MISSTATEMENTS. THOSE SHOULD ALSO SIMILARLY BE PRECLUDED FROM GOING TO TRIAL. WE'RE LEARNING ABOUT THEM FOR THE FIRST TIME NOW.

MR. PORRITT: IF I MAY, YOUR HONOR, WITH RESPECT, I DISAGREE WITH WHAT MR. LIFRAK JUST SAID.

I MEAN, PARAGRAPHS -- PARAGRAPH 136 IN THE -- IN THE COMPLAINT -- FIRST OF ALL, IN THE FACTUAL ALLEGATIONS WHICH ARE INCORPORATED INTO THE COUNT, THE ENTIRE AUGUST 30 BLOG POST IS SET FORTH.

SECOND, PARAGRAPH 136 IDENTIFIES A SPECIFIC QUOTE, WHICH I ASSUME DEFENDANTS AND I WILL AGREE ARE NOT SUBJECT TO

THIS MOTION. IT IS ACTUALLY TESTIMONY VERY CLOSELY RELATED TO WHAT IS SET FORTH IN THE MOTION THAT I HAVE CONTINUED TO COMMUNICATE, BUT, NONETHELESS.

THEN PARAGRAPH 138 IN THE COMPLAINT THAT SAYS THE ENTIRE BLOG POST PERMITTED INFORMATION REGARDING FUNDING INVESTOR INTEREST AND SO ON. AND WE CLARIFIED THIS IN RESPONSE TO -- IN RESPONSE TO THE INTERROGATORIES THAT WERE PROVIDED DURING THE COURSE OF DISCOVERY WITH EXTENSIVE DETAIL.

SO I DON'T THINK WHY -- AND THAT WAS -- THOSE WERE SERVED LAST YEAR ON ALL TIMES ACCORDING TO A SCHEDULE AGREED TO WITH THEN DEFENSE COUNSEL.

SO I REALLY DON'T THINK THEY CAN ARGUE ANY PREJUDICE OR ANY SURPRISE. THIS IS NOT SOME SECRET THEORY THAT'S BEING --

THE COURT: WHEN WAS THIS -- REMIND ME OF THE SEQUENCE OF THE DISCLOSURE OF THE PRECISE FALSE STATEMENTS THAT WERE MADE. IT WAS BY WAY OF INTERROGATORY?

MR. PORRITT: YES. THE INTERROGATORY RESPONSE, THEY SAID, YOU KNOW, IDENTIFY REASONS WHY YOU SAID THE AUGUST 13TH BLOG POST WAS MISLEADING, AND WE LAID FORTH WITH 20 PAGES, OR 18 PAGES, WHY THE AUGUST 1ST BLOG POST WAS MISLEADING.

AS YOUR HONOR KNOWS, WHEN YOU TALK ABOUT OMISSIONS, IT'S DIFFICULT TO IDENTIFY A SPECIFIC STATEMENT THAT OMITS A FACT BECAUSE EVERY STATEMENT IN THE BLOG POST OMITTED --

THE COURT: BUT HERE YOU'RE NOT -- WHAT I'M SEEING

HERE IS NOT AN OMISSION. IT'S A STATEMENT.

MR. PORRITT: ...CONTINUES TO COMMUNICATE. I UNDERSTAND THE COURT'S RULING IN THAT REGARD. I'M JUST TRYING TO RESPOND TO MR. LIFRAK'S RECENT STATEMENT, WHICH SAYS --

MR. LIFRAK: AND TO BE --

MR. PORRITT: THERE ARE LOTS OF OTHER ASPECTS OF THE AUGUST 13TH BLOG POST, WHICH WAS ALLEGED TO OMIT RELEVANT INFORMATION THAT SHOULD NOT BE MOVED AS AN ACTUAL MISREPRESENTATION. OF COURSE, IT STILL MAY BE RELEVANT AS A PARTIAL CORRECTIVE DISCLOSURE OR FULL CORRECTIVE DISCLOSURE DEPENDING ON WHICH -- WHETHER YOU LISTEN TO PLAINTIFFS OR DEFENDANTS.

MR. LIFRAK: TO BE CLEAR, YOUR HONOR, THE ALLEGED MISSTATEMENT YOUR HONOR READ DOESN'T APPEAR AS AN ALLEGED MISSTATEMENT IN THOSE INTERROGATORY RESPONSES.

SO TO ANSWER YOUR QUESTION DIRECTLY, IT HAS NEVER BEEN DISCLOSED UNTIL THE SUMMARY JUDGMENT MOTION. THAT'S THE FIRST TIME WE LEARNED THAT THE PLAINTIFF INTENDED TO GO TO TRIAL ON THAT ALLEGED MISSTATEMENT.

AND THE FACT THAT THE ENTIRE BLOG POST IS MENTIONED IN THE COMPLAINT, THE BLOG POST IS 1,100 WORDS, IT HAS 90 LINES. AS YOUR HONOR INDICATED, WE ARE ENTITLED TO KNOW AS A DEFENDANT IN A SECURITIES FRAUD CLASS ACTION WHAT THE SPECIFIC ALLEGED MISSTATEMENTS ARE. THOSE WERE NOT -- THERE ARE SOME IN THE COMPLAINT. THOSE WERE LOOKED AT BY THE COURT IN THE MOTION

TO DISMISS, AND THE COURT FOUND IN THE MOTION TO DISMISS RULING A COUPLE OF YEARS AGO THAT NOTHING IN THE BLOG POST, AS ALLEGED IN THE COMPLAINT, CONSTITUTED AN INDEPENDENT MISSTATEMENT.

AND SO IF PLAINTIFF WANTED TO HAVE OTHER MISSTATEMENTS FROM THE AUGUST 13TH BLOG POST GO TO THE JURY, PLAINTIFF SHOULD HAVE AMENDED THE COMPLAINT TO INCLUDE THOSE. PLAINTIFF DIDN'T. AND PLAINTIFF DIDN'T SPECIFICALLY IDENTIFY THESE SAME ALLEGED MISSTATEMENTS IN -- SPECIFICALLY IN THOSE INTERROGATORY RESPONSES.

THE COURT: ALL RIGHT. WELL, THE ONLY THING I HAVE BEFORE ME RIGHT NOW, AS I UNDERSTAND IT, IS THE CHALLENGE TO THIS ONE STATEMENT. IT WAS NOT PREVIOUSLY IDENTIFIED AND NOT IDENTIFIED IN A TIMELY WAY, AND SO MY RULING STANDS.

NOW, TO THE EXTENT THAT THERE ARE OTHER THINGS, I GUESS I'LL -- I DON'T KNOW IF THERE'S GOING TO BE A FURTHER IN LIMINE MOTION AT SOME POINT, BUT THE GENERAL RULE IS THAT THINGS HAVE TO BE IDENTIFIED WITH SPECIFICITY IN THIS AREA, AND THEY HAVE TO BE DONE SO IN A TIMELY WAY. IF THEY'RE NOT DONE SO, YOU KNOW, THEY'RE NOT GOING TO BE ALLOWED TO BE ADVANCED AT TRIAL.

SO WITHOUT KNOWING EXACTLY WHAT THE PLAINTIFF INTENDS AT THIS POINT, BUT I WILL SAY THAT, AS A GENERAL PRINCIPLE, IF THERE ARE OTHER STATEMENTS, EVEN IF IT'S TAKEN FROM THAT SAME BLOG, THAT WEREN'T PREVIOUSLY IDENTIFIED AS A FALSE STATEMENT AND SUBJECT TO, YOU KNOW, THE KIND OF DISCLOSURE THAT WE EXPECT

IN THESE CASES, THEN IT'S GOING TO BE PROBLEMATIC. I'M JUST GOING TO LEAVE IT AT THAT AT THIS POINT.

LET'S TALK ABOUT MR. -- DR. HARTZMARK'S REPORT.

MAYBE THE PLAINTIFF CAN HELP ME UNDERSTAND. THE DIFFERENCE BETWEEN 2327 ATTRIBUTABLE TO DIRECT ARTIFICIAL INFLATION AND THE ADDITIONAL 4340, OR THE TOTAL OF 4667, 4340 OF WHICH IS ATTRIBUTABLE TO WHAT HE CALLS CONSEQUENTIAL HARM, MAYBE YOU CAN EXPLAIN IN A NUTSHELL, WHAT ARE THESE TWO DIFFERENT NUMBERS AND WHY ARE THEY DIFFERENT?

MR. PORRITT: THANK YOU VERY MUCH, YOUR HONOR. THEY'RE REALLY SUBSETS OF THE OVERALL INFLATION.

SO I THINK THE EASIEST WAY OF ADDRESSING THIS IS TO THINK OF THIS AS A -- IF THIS WAS IN THE CONTEXT OF A CONVENTIONAL SECURITIES CLASS ACTION, TYPICALLY, THE -- WHY THE ACCEPTED METHODOLOGY THAT HAS FOLLOWED, WHICH I'M SURE YOUR HONOR IS FAMILIAR WITH, IS SOMETIMES REFERRED TO AS BACKCASTING, WHICH IS YOU LOOK AT THE -- AND LET'S TALK ABOUT A SITUATION WHERE YOU JUST HAVE A SINGLE END-OF-CLASS-PERIOD CORRECTIVE DISCLOSURE, OR REALIZATION, OF THE RISK OR WHATEVER IT MAY BE. YOU CALCULATE, YOU DISAGGREGATE, YOU ALLOW FOR MARKET FACTORS, AND YOU END UP WITH AN EXPERT IDENTIFIES -- LET'S CALL IT, $50, FOR EXAMPLE -- $50 OF THE TWELVE THAT WAS ATTRIBUTABLE TO THE REALIZATION OF THE RISK OR CORRECTIVE DISCLOSURE.

THEY THEN RUN THAT BACKWARDS THROUGH THE CLASS PERIOD

TO GET TO -- AND IF THERE'S OTHER CORRECTIVE DISCLOSURE OR WHAT HAVE YOU, IT COMES OUT IN PIECES. SO IT'S BUILT UP OVER TIME. THAT IS WHAT THE -- THAT IS WHAT WE START WITH WHERE THE PRICE ENDED UP ONCE THE FRAUD WAS DISCLOSED.

WHAT DR. HARTZMARK DOES HERE IS EXACTLY THAT, WHICH IS AT THE END ON AUGUST 17, WHICH, BASED ON HIS ANALYSIS OF BOTH QUALITATIVE AND QUANTITATIVE DATA, HE CONCLUDES AT THAT TIME THE MARKET HAD UNDERSTOOD THE FALSITY OF THE MISREPRESENTATIONS THAT STARTED ON AUGUST 7TH WITH THE TWEETS, FUNDING SECURED, ET CETERA, ET CETERA. THAT LED, AFTER ACCOUNTING TO MARKET FORCES AND EFFECTS AND SO ON, HAD A PRICE OF $312.90.

SO THAT, IF YOU LIKE, IS THE PRICE THAT REFLECTS ALL THE KNOWLEDGE -- SO THAT REFLECTS THE FACT THAT THERE WAS NO FUNDING SECURED. THERE WAS NO INVESTOR SUPPORT. THERE ARE MORE AND MORE STEPS TO BE TAKEN. STILL REFLECTS THE FACT THAT ELON MUSK IS CONSIDERING TAKING TESLA PRIVATE, BECAUSE THAT FACT WAS KNOWN TO THE MARKET EVEN BEFORE THE 7TH, AS PROFESSOR FISCHEL, DEFENDANT'S WILL TESTIFY TO, OPINE.

SO THAT IS -- IF YOU LIKE, THAT IS DIRECTLY EQUIVALENT TO THE PRICE YOU WOULD SEE END OF A SECURITIES CLASS PERIOD. WHAT DR. HARTZMARK HAS DONE IS THEN -- IS THEN PROJECTED THAT BACKWARDS. HE HAS A MODEL ABOUT WHICH -- THE EXTENT TO WHICH THAT IS THEN -- REALLY SUBTRACTING THAT FROM THE PRICE TELLS YOU THE DEGREE TO WHICH PRICE IS INFLATED ON

ANY GIVEN DAY.

NOW WHERE THE DIFFERENCE BETWEEN DIRECT AND THE SO-CALLED CONSEQUENTIAL HARM, WHERE THAT PLAYS IN, IS THAT IN MANY SECURITY CLASS ACTIONS, AS YOUR HONOR IS AWARE, THERE IS NO INITIAL PRICE IMPACT.

IN FACT, THAT'S BEEN LITIGATED. THAT'S WHAT THE WHOLE *GOLDMAN SACHS*, ENDLESS, IT SEEMS, LITIGATION WITH THE SECOND CIRCUIT SUPREME COURT IS ALL ABOUT, TO WHAT EXTENT YOU NEED TO SHOW PRICE IMPACT AT THE FRONT END. AND THE SUPREME COURT AND MOST OF THE SECOND CIRCUIT HAD CONSISTENTLY COME DOWN SAYING YOU DON'T.

BUT WHAT WE HAVE HERE IS WE HAVE ONE OF THOSE CASES. IT'S NOT ALONE, BUT THESE ARE THE MINORITY OF SECURITY CLASS ACTIONS, I THINK, WHERE YOU HAVE VERY DIRECT MEASURABLE PRICE IMPACT AT THE BEGINNING OF THE CLASS PERIOD. THAT'S THE $23. SO WHAT --

THE COURT: THE 23 REPRESENTS FRONT END DISCERNIBLE, THE RISE FOLLOWING AUGUST 17TH --

MR. PORRITT: 17TH TWEET, YES.

AND THEN THE DIFFERENCE BETWEEN THE $23 AND THE $66, WHICH IS THE DIFFERENCE BETWEEN THE MARKET HIGH, THE CLASS PERIOD HIGH, AND THE 312.90, REFLECTS CONSEQUENTIAL HARM, WHICH IS WHAT WE TALK ABOUT, WHICH IS CERTAINLY RECOVERABLE AS THE NINTH CIRCUIT HAS ESTABLISHED IN THE *AMBASSADOR HOTEL* AND IS ALWAYS RECOVERABLE IN THESE CASES, WHICH REFLECTS REPUTATIONAL

HARM, SEC INVESTIGATION, RISK, REGULATORY RISK, DISTRACTIONS OR INVESTORS, ALL OF THAT THE HARM THAT DIRECTLY RESULTS FROM THE FRAUD.

AND SO THAT EXISTS THROUGHOUT CLASS PERIOD.

THE COURT: WHAT QUALITATIVE EVIDENCE IS THERE? SO YOU ARE ATTRIBUTING THAT THE BACK-END HARM, THE ADDITIONAL 43.40 IS ATTRIBUTABLE NOT TO THE DIRECT INFLATION, BUT TO THESE CONSEQUENTIAL THINGS LIKE KNOWLEDGE OF HARM TO REPUTATION, KNOWLEDGE OR ANTICIPATION OF REGULATORY RISK, KNOWLEDGE OF LACK OF SUFFICIENT CORPORATE CONTROLS WITHIN TESLA, ET CETERA, ET CETERA. IS THAT WHAT YOU'RE SAYING?

MR. PORRITT: CORRECT, YOUR HONOR, WHICH IS THE CASE IN EVERY -- EVERY TIME A COMPANY IS ESSENTIALLY IS FOUND LIABLE FOR SECURITIES FRAUD.

THE COURT: WELL, WHAT -- IS THERE ANY QUALITATIVE EVIDENCE -- IS THAT SOMETHING YOU JUST ASSUME EVERY TIME THERE'S A DISCLOSURE OF A SECURITIES FRAUD, THAT, WELL, HERE COMES -- THE SEC IS RIGHT AROUND THE CORNER, THAT SHOWS PEOPLE ARE SLEEPING ON THE -- THE DIRECTORS WEREN'T DOING WHAT THEY'RE SUPPOSED TO DO; YEP, THERE'S PEOPLE IN CHARGE THAT AREN'T -- THEREFORE, THERE'S GOING TO BE CONSEQUENTIAL HARM THAT JUST FLOWS?

IS THERE ANY SPECIFIC QUALITATIVE EVIDENCE HERE, SUCH AS SOME INDICATION, SEC ANNOUNCEMENT SHORTLY BEFORE THIS, OR COMMENTATOR ANALYSIS THAT, YOU KNOW, THIS SHOWS A DEEPER

STRUCTURAL PROBLEM WITHIN TESLA? IS THERE SOMETHING?

MR. PORRITT: I MEAN -- THE SHORT ANSWER IS YES, LOTS. I MEAN DR. HARTZMARK'S REPORT IS FULL OF DISCUSSION OF RELEVANT NEWS REPORTS, MANY OF WHICH COVER THINGS SUCH AS -- EVEN AS EARLY AS AUGUST -- YOU KNOW, AUGUST 8TH, AUGUST 9TH IS WHEN THE SEC INVESTIGATION WAS ANNOUNCED AND STOCK PRICE REACTED. AT THAT POINT IT WENT DOWN. THAT WOULD BE AN EXAMPLE OF THIS CONSEQUENTIAL HARM.

INDEED, THE NINTH CIRCUIT RECOGNIZED IN *LLOYD* THAT ANNOUNCEMENT OF SEC INVESTIGATION CAN AMOUNT TO HARM AND THAT LOSS INDICATED --

THE COURT: THAT WAS ANNOUNCED RELATIVE TO THIS PARTICULAR TWEET BY AUGUST 8TH, YOU SAY?

MR. PORRITT: BUT AUGUST 8TH, THEY'RE ANNOUNCING THE SEC WAS LAUNCHING AN INVESTIGATION INTO THE TRUTHFULNESS OF THE AUGUST 7TH TWEETS.

THEN THERE WAS ONGOING -- THAT WAS CONTINUED TO BE DISCUSSED REALLY THROUGHOUT THE CLASS PERIOD. THERE WAS FURTHER ANNOUNCEMENTS THAT THE SEC HAD ISSUED SUBPOENAS, WHICH I THINK CAME OUT ON MAYBE AUGUST 14TH. I APOLOGIZE. I MEAN, I HAVE THE DATE DIRECTLY AT HAND. THAT WAS FORMALLY ANNOUNCED.

YOU HAD, SAY, COMMENTARY. YOU HAD PEOPLE LIKE PROFESSOR JOHN COFFEE SAYING IF FUNDING IS, IN FACT, NOT SECURED, THIS WOULD SEEM TO BE A VERY SERIOUS CASE OF SECURITIES FRAUD WHICH WOULD HAVE CONSEQUENCES.

YOU HAVE DISCUSSION OF WHETHER THE BOARD WAS REVIEWING MR. MUSK'S TWEETS BEFORE HE WAS TWEETING THEM, WHICH IS OBVIOUSLY A -- NOT ONLY GOES TO THE CIRCUMSTANCES AND THE RECKLESSNESS AND THE SCIENTER OF THE BOARD AND MR. MUSK POTENTIALLY ISSUING THESE TWEETS, BUT ALSO DIRECTLY RAISES GRAVE CORPORATE GOVERNANCE CONCERNS, WHICH, AS AN INVESTOR --

THE COURT: ALL RIGHT. I TAKE IT THERE WAS NO -- I DON'T KNOW IF THE WORD IS EVENT ANALYSIS -- BUT NO STATISTICALLY SIGNIFICANT DROP THAT COULD BE TIED TO ANY ONE OF THESE SEC ANNOUNCEMENTS OR ANY ONE OF THESE COMMENTATOR ANNOUNCEMENTS, ALL THESE THINGS THAT CONTRIBUTED, YOUR EXPERT SAYS, TO THE CONSEQUENTIAL HARM, THERE WAS NO -- THAT COULD NOT BE DISCERNED STATISTICALLY ON A CASE-BY-CASE BASIS. IS THAT A FAIR ASSUMPTION?

MR. PORRITT: WITH RESPECT, NO, YOUR HONOR. SO THIS IS WHERE HE LOOKS AT THE ENTIRE -- BECAUSE YOU HAVE 2,400 NEWS ARTICLES BEING PUBLISHED DURING THESE EIGHT DAYS IN THE CLASS PERIOD, OF WHICH -- OVER 400 -- OF WHICH ONLY 12 SUBJECTS -- 12 ARTICLES OR NEWS MENTIONS RELATE TO ANY TOPIC OTHER THAN THE GOING PRIVATE TRANSACTION.

AND OF THOSE 12, DR. HARTZMARK EXAMINES EACH ONE OF THOSE 12, AND SAYS YOU WOULD EXPECT THOSE TO HAVE -- THEY WERE MOSTLY OLD NEWS AND YOU WOULD NOT EXPECT THEM TO HAVE ANY -- CERTAINLY NO NEGATIVE PRICE IMPACT ON STOCK PRICE.

SO HE LOOKS AT THE ENTIRE PERIOD FROM AUGUST 8TH TO

AUGUST 16TH AS AN EVENT WINDOW. AND UNDER THAT -- DURING THAT EVENT WINDOW, THERE WAS SIGNIFICANT PRICE DECLINE, AND THEN -- AND IT ENDS WITH AN EVEN -- IT ENDS WITH A STATISTICALLY SIGNIFICANT PRICE DECLINE FOLLOWING THE NEW YORK TIMES ARTICLE ON AUGUST 17TH.

SO THAT IS -- SO --

THE COURT: THE CRITIQUE BY THE DEFENDANTS THAT THERE WAS NO ADEQUATE DISAGGREGATION OF ANY OTHER CAUSAL FACTORS HERE THAT WERE NOT RELATED TO THE FALSE -- FALSITY AND THE TWEET, AT LEAST AS I HAVE FOUND, IS THAT JUST THE OTHER SIDE OF THE SAME COIN? THAT IS, IF THERE WAS AN ADEQUATE ATTEMPT AT DISAGGREGATION, THAT THIS CONSEQUENTIAL HARM IS NOTHING MORE THAN SORT OF TRADITIONAL DAMAGE ANALYSIS IN A SECURITIES FRAUD CASE?

MR. PORRITT: I THINK -- I THINK WHAT YOU'RE SAYING IS CORRECT, YOUR HONOR.

AND THAT STATEMENT THAT HE DID NOT DISAGGREGATE FOR OTHER NON- -- FOR OTHER COMPANIES' SPECIFIC INFORMATION IS JUST -- IS JUST INCORRECT.

I MEAN HE HAS 12 -- HE HAS WHOLE PARAGRAPHS IN HIS COMPLAINT WHERE HE GOES THROUGH EACH ONE OF THOSE 12 STATEMENTS. I MEAN HE LOOKS AT EVERY -- DR. HARTZMARK LOOKS AT EVERY SINGLE STATEMENT, ALL 2,400 ISSUED DURING THE CLASS PERIOD. HE HAS AN APPENDIX LISTING THEM ALL OUT. HE LOOKED AT THE STOCK PRICE REACTION MINUTE BY MINUTE DURING THE CLASS

PERIOD.

SO TO SAY HE'S NOT DISAGGREGATING -- HE HASN'T DISAGGREGATED THE WAY DEFENDANTS WOULD LIKE HIM TO DISAGGREGATE, BUT HE LOOKS AT EACH ONE AND CONCLUDED THAT THEY WOULD NOT -- YOU WOULD NOT EXPECT THAT THESE PRICES -- AND THERE'S NO EVIDENCE THAT THESE PRICES HAD A SIGNIFICANT IMPACT ON THE STOCK PRICE. AND DEFENDANT'S OWN EXPERT HAS NOT IDENTIFIED ANY NON-FRAUD RELATED INFORMATION IN THE CLASS PERIOD THAT HAD A STATISTICALLY SIGNIFICANT IMPACT ON THE STOCK PRICE EITHER. HE, IN FACT, ACCEPTED DR. HARTZMARK'S EVENT STUDY AND THE CONCLUSIONS IN THIS REGARD.

SO, YOU KNOW, THEY DIFFER TO THEIR INTERPRETATION OF THE RESULTS, BUT THE ACTUAL METHODOLOGY -- THERE WAS, IN FACT, AGREEMENT BETWEEN THE EXPERTS, WHICH IS NOT SURPRISING, BECAUSE DR. HARTZMARK, IN FACT, BASED HIS METHODOLOGY ON THE METHODOLOGY OF DR. -- BY PROFESSOR FISCHEL IN THE *HOUSEHOLD* CASE, EXCEPT IN *HOUSEHOLD*, PROFESSOR FISCHEL APPLIED IT TO A 228-DAY PERIOD, RATHER THAN SIMPLY EIGHT TRADING DAYS.

THE COURT: WHAT ABOUT THE ALLEGED FAILURE TO TAKE INTO ACCOUNT OR DISAGGREGATE, FOR INSTANCE, NEWS ABOUT THE DELAY IN THE TESLA 3 OR ISSUES ABOUT MR. MUSK'S HEALTH AND WELL BEING?

MR. PORRITT: WELL, I MEAN, I'M NOT SURE THERE WERE DELAYS -- INFORMATION FROM THE DELAYS IN THE TESLA 3, BUT TO THE EXTENT, DR. HARTZMARK LOOKED AT THEM, THAT WAS ALL NEW.

THAT HAD BEEN REPORTED LONG TIME. THAT WAS REPORTED AT THE TIME OF THE ANNUAL MEETING IN APRIL 2018, DELAYS IN THE MODEL 3 WAS WELL REPORTED, AS WELL AS THE STRESS THAT MR. MUSK EXPRESSED TO BE EXPERIENCING DURING THE COURSE OF 2018.

HIS MENTAL HEALTH, DEFENDANTS POINT TO THE DISCUSSION OF THAT IN THE NEW YORK TIMES ARTICLE ON AUGUST 16TH, BUT THEY FAIL TO DISCUSS THE FACT THAT THERE HAD BEEN ANOTHER ARTICLE RELATING TO ONLY ELON MUSK'S MENTAL HEALTH ON AUGUST 15TH, ALSO PUBLISHED BY THE NEW YORK TIMES, WHICH SEEMED TO HAVE -- WHICH HAS NO IMPACT ON THE STOCK PRICE.

SO TO THE EXTENT THAT THEY ARGUE THAT THERE'S -- YOU KNOW, THEY DON'T REALLY HAVE AN EXPLANATION AS TO WHY THE STOCK PRICE DECLINED FOLLOWING THE NEW YORK TIMES ARTICLE, BECAUSE THEY JUST SIMPLY SAID THEY HAD NO NEW NEWS, IN WHICH CASE WHY WAS THERE -- YOU KNOW, THAT WOULD -- WHY WAS THERE A STATISTICALLY SIGNIFICANT STOCK PRICE DECLINE? THAT WOULD SEEM TO DEFY TRADITIONAL CAPITAL MARKETS --

THE COURT: WHAT ABOUT THE INITIAL FAILURE -- ALLEGED FAILURE OF DISAGGREGATION OF THE -- CONSIDERING TAKING TESLA PRIVATE AT 420 VERSUS THE FUNDING SECURED? YES, THERE WAS, YOU KNOW, THERE HAVE BEEN NOISE ABOUT GOING PRIVATE, INTEREST IN GOING PRIVATE, BUT PUTTING AN ACTUAL NUMBER ON IT, THAT WAS NEW, WASN'T IT?

MR. PORRITT: WELL, SO -- SO I HAVE TWO RESPONSES, YOUR HONOR.

FIRST OF ALL IS -- YOU KNOW, ELON MUSK DELIBERATELY WOVE THE TWO QUESTIONS TOGETHER AND TESTIFIED VERY CLEARLY TO THAT EFFECT. SO THE WHOLE POINT -- HE SAID THE WHOLE POINT OF HIS TWEET WAS TO SAY FUNDING WAS SECURED AT 420.

SO I DON'T THINK -- I THINK IT'S -- I DON'T THINK IT'S REQUIRED UNDER THE SECURITIES LAWS. I THINK IT WOULD BE -- STATEMENTS HAVE TO BE READ IN CONTEXT, AS YOUR HONOR KNOWS, AND I THINK IT'S -- SO THE ENTIRE STATEMENT SHOULD BE -- YOUR HONOR HAS FOUND TO BE FALSE. THE FUNDING SECURED WAS FALSE. AND I THINK THE FUNDING SECURED IS NOT SOME TRIVIAL OR EASILY SEVERABLE PART OF THAT STATEMENT, THE FIRST TWEET ON AUGUST 7TH. SO I THINK THAT IS ENOUGH FOR -- POSES A LOSS CAUSATION. I THINK YOU HAVE TO ANALYZE THEM COLLECTIVELY, FIRST OF ALL.

SECONDLY, DR. HARTZMARK DOES LOOK AT THE EVIDENCE OF LOOKING AT THE QUESTION OF CONSIDERING TAKING TESLA PRIVATE. HE, ONCE AGAIN, CONCLUDES YOU DO NOT HAVE TO DISAGGREGATE ANY ASPECT OF THAT.

SO WHAT DOES HE LOOK AT?

SO, FIRST OF ALL, YOU LOOK AT THE PRICE IMMEDIATELY PRECEDING THE AUGUST 7TH TWEET, WHICH, AS PROFESSOR FISCHEL HAS TESTIFIED, DID INCLUDE THE PUBLICLY-STATED DESIRE OF ELON MUSK TO CONSIDER -- YOU KNOW, THAT HE WAS CONSIDERING TAKING TESLA PRIVATE AT SOME STAGE.

THEN YOU LOOK AT -- THEN YOU LOOK AT THE -- WHAT

OCCURRED AFTER AUGUST 17TH.

SO BY AUGUST 17TH, WE THINK THE EVIDENCE IS VERY CLEAR, BOTH QUALITATIVELY AND QUANTITATIVELY, THAT THE MARKET UNDERSTOOD THAT FUNDING WAS NOT SECURE AND INVESTOR SUPPORT WAS NOT CONFIRMED.

TO THE EXTENT -- THE BEST EVIDENCE OF THAT IS A REPORT -- ANALYST REPORT ISSUED BY J.P. MORGAN ON AUGUST 20. SO THAT'S THE MONDAY AFTER THE NEW YORK TIMES ARTICLE, WHICH WAS, YOU KNOW, INCORPORATED -- EVALUATED BY THE MARKET ON AUGUST 17TH. THAT'S A FRIDAY. SO J.P. MORGAN ISSUED THEIR REPORT.

THE COURT: ON THE 20TH, YOU SAY IT WAS? AUGUST 20?

MR. PORRITT: AUGUST 20, CORRECT, YOUR HONOR. JUST BEAR WITH ME. I'LL GET YOU THE EXHIBIT REFERENCE FOR THAT. BUT IT'S -- BEAR WITH ME. I THINK IT'S EXHIBIT EITHER 23 OR 25.

BUT IN THAT REPORT -- SO AFTER SAYING THAT FUNDING IS NOT SECURED, THERE IS NO FORMAL PROPOSAL, INVESTOR SUPPORT IS NOT THERE, HE THEN SAYS BUT ELON LOAN MUSK DOES CONSIDER TAKING TESLA PRIVATE. IT'S EXHIBIT 23, YOUR HONOR.

TESLA DOES APPEAR TO BE EXPLORING IT, GOING PRIVATE TRANSACTION. SO THAT IS STILL THE CASE. THE MARKET UNDERSTOOD THAT ON AUGUST 20TH. BY THAT STAGE, IT WAS ALREADY -- THE PRICE WAS ALREADY DOWN. THE MARKET PRICE IS 305, ALLOWING FOR MARKET FACTORS. DR. HARTZMARK IDENTIFIES THAT AT 312.90.

SO, AT THAT POINT, THE FUNDING SECURED HAS BEEN DIVORCED FROM CONSIDERING TAKING TESLA PRIVATE AT 420, BECAUSE THAT IS STILL THE STATED PRICE THAT HE WAS CONTEMPLATING IT GOING PRIVATE TRANSACTION.

IT WASN'T UNTIL AUGUST 24TH THAT THAT WAS -- THAT THAT WAS THEN CORRECTED, OR REVERSED, OR WITHDRAWN, WHEN ELON MUSK SAYS HE WAS STAYING PUBLIC.

SO WE KNOW HOW THE MARKET VALUED THE STATEMENT, "I'M CONSIDERING TAKING TESLA PRIVATE AT 420," BY LOOKING AT THE REACTION ON AUGUST 24TH WHEN THAT WAS FINALLY WITHDRAWN. AND THE REACTION THERE WAS NOT STATISTICALLY SIGNIFICANT. THE PRICE MOVED, LIKE, $3 FOR A $305 STOCK. SO LESS THAN -- APPROXIMATELY LESS THAN ONE PERCENT.

PUTTING ALL THAT TOGETHER, IN ADDITION TO ALL THE QUALITATIVE ANALYSIS -- YOU KNOW, I'M JUST SKETCHING OUT, YOUR HONOR, TRYING TO INCORPORATE A 200-PAGE REPORT IN A COUPLE OF MINUTES.

YOU CAN ALSO LOOK AT ANOTHER THING THAT'S VERY IMPORTANT AND HAS VERY PERSUASIVE POWER, IS LOOKING AT WHAT'S CALLED THE IMPLIED VOLATILITY, WHICH IS A NUMBER THAT YOU DERIVE FROM LOOKING AT THE MARKET PRICES, THE STOCK OPTIONS OF TESLA, WHICH LOOK AT THE -- IMPLIED VOLATILITY IS AN EXPRESSION OF THE EXPECTED SPREAD OR DISTRIBUTION OF OPTION PRICES IN THE FUTURE -- OF STOCK PRICES OF TESLA IN THE FUTURE.

ACADEMIC LITERATURE HOLDS, AND PROFESSOR FISCHEL

AGREES, THAT WHEN YOU HAVE AN ANNOUNCED TRANSACTION AT A PRICE, MERGER OR GOING PRIVATE, THEN THAT WILL REDUCE IMPLIED VOLATILITY, BECAUSE, NATURALLY, THE SPREAD TIGHTENS AROUND THE ANNOUNCED PRICE OF THE TRANSACTION.

AND THAT'S EXACTLY WHAT YOU SEE ON AUGUST 7TH, WHICH IS THAT IMPLIED VOLATILITY MEASURED FROM ACTUAL MARKET PRICES OF THE TESLA STOCK OPTIONS GOES -- AFTER BEING STABLE PRIOR TO AUGUST 7TH, DROPS DRAMATICALLY. DROPS FROM APPROXIMATELY 50 PERCENT TO 32 PERCENT.

WHAT THEN HAPPENS IS THAT THEN THAT IMPLIED VOLATILITY CREEPS UP DURING THE CLASS PERIOD, AND THEN ON AUGUST 17TH IT DRAMATICALLY REVERTS, ESSENTIALLY ALL THE WAY BACK TO 50 PERCENT, 49 PERCENT.

SO THAT IS, IF YOU LIKE, THE STABLE-STATE EQUILLIBRUM, WHICH INCLUDES THE POSSIBILITY THAT ELON MUSK WILL TAKE TESLA PRIVATE. SO -- AND THEN IT CONTINUES AND DOESN'T MOVE AGAIN ON AUGUST 24TH WHEN IT IS FINALLY ANNOUNCED THAT HE'S NOT TAKING TESLA PRIVATE, AT LEAST NOT ANY TIME SOON.

SO, PUTTING ALL THAT TOGETHER -- I KNOW THAT'S A LOT, AND I APOLOGIZE -- I THINK IT'S VERY CLEAR DR. HARTZMARK HAS CLEARLY CONSIDERED THE POINT DEFENDANTS MAKE AS APPLIED, RECOGNIZED FINANCIAL METRICS, LOOKED AT A QUANTITATIVE AND QUALITATIVE ANALYSIS; AGAIN, LOOKING AT ALL THE DISCUSSION BY THE MEDIA, INVESTORS, ET CETERA, DURING THE CLASS PERIOD AND AFTERWARDS AND HAS CONCLUDED THAT WHAT HE HAS DONE IS MEASURED

THE EFFECT ON THE STOCK PRICE DUE TO THE MISLEADING STATEMENTS, AUGUST 7TH, AND, YOU KNOW, FUNDING SECURED, INVESTOR SUPPORT IS CONFIRMED, AND THE ONLY REASON THAT'S NOT CONTINGENT -- ONLY REASON IT'S NOT CERTAIN IS THAT IT'S CONTINGENT ON SHAREHOLDER VOTE. AND THAT ALL THAT WAS ELIMINATED FROM THE EFFECT OF THE PRICE BY AUGUST 17.

SO -- AND TO GO BACK TO WHERE WE STARTED WITH, PROFESSOR FISCHEL LARGELY AGREES -- WELL, HE DISAGREES ABOUT WHETHER -- HE WOULDN'T AGREE THAT IT WAS TRUE OR FALSE. HE OFFERED NO REAL CONCLUSION ON THAT. HE CON- -- HE AGREED THAT THE AUGUST 7TH TWEETS WERE PART OF THE OVERALL MIX OF INFORMATION FOLLOWING THE AUGUST 13TH BLOGPOST.

HE AGREED THAT THE AUGUST 17TH NEW YORK TIMES ARTICLE AND THE PRICE REACTION WOULD HAVE BEEN IN THE CONTEXT OF THE AUGUST 7TH TWEETS, SO -- WHICH IS, IN FACT, ALSO CONSISTENT WITH COMMON SENSE, WHICH IS TO SAY YOU HAVE THESE MAJOR ANNOUNCEMENTS, AND WITHIN TEN DAYS, OF COURSE, THE MARKET IS STILL GOING TO BE EVALUATED AND REACTING TO IT.

SO, I APOLOGIZE FOR THE VERY LONG-WINDED ANSWER.

THE COURT: ALL RIGHT.

MR. PORRITT: IT'S A VERY COMPLICATED SUBJECT AND -- BUT --

THE COURT: LET ME ASK THE DEFENSE TO RESPOND TO -- THE MORE SIMPLE QUESTION IS WHY DOESN'T THIS ALL DEMONSTRATE THAT THERE ARE FACTUAL ISSUES HERE, THERE ARE INTERPRETIVE

ISSUES ABOUT WHETHER THE APPLICATION OF THE METHODOLOGY WAS CORRECT AND WHETHER SUFFICIENT WEIGHT WAS GIVEN TO VARIOUS THINGS AND IF THINGS WERE TREATED SUFFICIENTLY WELL, BUT WHY IS THIS A DAUBERT GATEKEEPING QUESTION?

MR. ROSSMAN: YOUR HONOR, ANDREW ROSSMAN FOR DEFENDANTS.

THE COURT: YEAH.

MR. ROSSMAN: SO THERE ARE TWO FUNDAMENTAL SHOWSTOPPER ISSUES HERE THAT THEY CAN'T GET OVER.

ONE IS THEY CAN'T PROVIDE YOUR HONOR WITH A DAMAGES MODEL THAT IS CONTRARY TO LAW. AND WE RELY, FOR THE 10B-5 LAW, UNITED STATES SUPREME COURT IN THE *AFFILIATED YOUTH* DECISION, *IN THE GOLDMAN SACHS* DECISION MORE RECENTLY. AND THEY DON'T DISPUTE IT.

IN THEIR OPPOSITION BRIEF AT PAGE 9, THEY SAY, "MEASURED OUT-OF-POCKET DAMAGES." OUT-OF-POCKET DAMAGES, WHICH IS WHAT 10B-5 PROVIDES IS THE DIFFERENCE PAID -- IS THE DIFFERENCE PAID AND WHAT THEY WOULD HAVE PAID HAD THERE BEEN NO FRAUDULENT CONDUCT. THAT'S THE KEY POINT. WHAT'S THE BUT-FOR STATE OF THE WORLD? NO FRAUDULENT CONDUCT. AND WHAT'S THE DIFFERENCE BETWEEN WHAT THEY PAID, WHAT THEY RECEIVED, AND WHAT THEY WOULD HAVE HAD THERE BEEN NO FRAUDULENT CONDUCT AS ALLEGED.

SO THEY CAN'T GO CONTRARY TO THE LAW, AND I'LL EXPLAIN IN A SECOND WHY, YOUR HONOR, THIS MODEL RESTS ON A

LEGALLY ERRONEOUS ASSUMPTION.

THEY ALSO, YOUR HONOR --

THE COURT: LET ME JUST STOP YOU RIGHT THERE. I MEAN, I HAVE THEIR BRIEF. ISN'T THE ARGUMENT THAT, YEAH, HAD THERE NOT BEEN FRAUDULENT CONDUCT. BUT IF THERE IS FRAUDULENT CONDUCT, IT HAS CERTAIN CONSEQUENCES, SUCH AS SHAKING THE CONFIDENCE IN THE -- EITHER THE STRUCTURE, THE MANAGEMENT -- SECURITIES STRUCTURE OF THE ORGANIZATION AT ISSUE OR, SORT OF, SKY-IS-FALLING KIND OF SCENARIO, WHICH WOULD THEN IMPACT PRICES IN A WAY THAT MIGHT NOT HAVE HAPPENED HAD IT NOT BEEN FOR THE FRAUD AND THE REVELATION OF THE FRAUD.

I'M NOT SURE WHY JUST THAT STATEMENT PRECLUDES WHAT THEY CALL CONSEQUENCES DAMAGES.

MR. ROSSMAN: IT DOES, YOUR HONOR.

FIRST, I'LL SAY THIS: THEY DON'T CITE A SINGLE CASE. THERE IS NONE, NONE -- OKAY -- WHERE THERE WAS CONSEQUENTIAL DAMAGES BASED ON A CHANGE IN THE MARKET PRICE THAT WAS SUPPORTED AS A DAUBERT, YOU KNOW, CLEARABLE MODEL BY AN EXPERT. OKAY?

THE ONLY CASE THAT MR. PORRITT CITED WAS THE *AMBASSADOR* CASE. IN THE *AMBASSADOR* CASE, THE CONSEQUENTIAL DAMAGES THE COURT FOUND THERE WERE $500,000 OF OUT OF POCKET THAT WAS PAID BY PLAINTIFFS IN ORDER TO OBTAIN RESCISSION OF THE STOCK. OKAY? TO MITIGATE THEIR RESCISSION DAMAGES IN THE *AMBASSADOR HOTEL* CASE, NOT ABOUT SUBSEQUENT DECLINES IN THE

STOCK PRICE.

THE FOURTH CIRCUIT AND THE SECOND CIRCUIT IN THE *OMNICOM* CASE THAT WE CITE MAKES IT CRYSTAL CLEAR THAT 10B-5 DOES NOT ENTITLE PLAINTIFFS TO SUBSEQUENT STOCK DECLINES THAT FOLLOW AFTER THERE'S A REVELATION OF THE TRUTH BASED ON KNOCK-ON EFFECTS FROM THE FRAUD, WHETHER THOSE KNOCK-ON EFFECTS INCLUDE, IN ONE CASE, A LAWSUIT INVOLVING THE CEO OR NEGATIVE PUBLICITY.

AND EXACTLY THE SAME THING WOULD APPLY, YOUR HONOR, IF WE WERE TALKING ABOUT REGULATORY CONSEQUENCES. THEY HAVE TO SHOW THAT THERE IS A DIRECT AND MEASURABLE HARM PAID IN THE INFLATION OF THE STOCK PRICE. THEY SHOW THAT -- OKAY -- ACCORDING TO DR. HARTZMARK. I'M NOT SAYING I AGREE WITH HIM. BUT THEIR CASE, YOUR HONOR, IS THAT THERE WAS A DIRECT INFLATION ON DAY ONE, AND IT'S MEASURED BY THE DIFFERENCE BETWEEN THE UNAFFECTED OR PRE-TWEET PRICE OF 356.85 AND THE CLOSING PRICE THAT DAY OF 379.57. THAT'S WHERE THE $23.27 COMES FROM. THAT'S AFTER ADJUSTMENT FOR OTHER MARKET FACTORS. OKAY?

SO WHAT THEY'RE SAYING, ESSENTIALLY, IS THAT'S THE AMOUNT OF INFLATION THAT YOU HAVE FROM THE EFFECTS OF THE ALLEGED FALSE TWEET.

BEFORE I EVEN GET TO THE DISAGGREGATION PROBLEMS THEY HAVE, YOUR HONOR, WHAT DR. HARTZMARK IS ASKING IS FOR YOU TO TRIPLE THOSE DAMAGES, OKAY, OR ALLOW THE JURY TO CONSIDER

TRIPLING THOSE DAMAGES, BY MAKING THE ASSUMPTION THAT THE BUT-FOR PRICE OF TESLA STOCK, BUT FOR THE ALLEGED FRAUDULENT CONDUCT, WOULD BE SOMETHING THAT'S IMPOSSIBLE, LITERALLY IMPOSSIBLE, IT WOULD BE $312.90. OKAY? THAT'S HOW PLAINTIFFS DESCRIBE IT IN THEIR BRIEF AT PAGE 3.

SO WHAT THEY'RE ASSUMING IS, YOUR HONOR, THAT IF THERE WERE NO FRAUDULENT CONDUCT, THAT THE PRICE WOULD ACTUALLY BE BELOW GROUND LEVEL BY $44, THAT IT WOULD BE BELOW THE UNAFFECTED PRE-TWEET PRICE. THAT MAKES NO LOGICAL SENSE, OF COURSE, BECAUSE IF THERE WERE NO TWEET AT ALL ABOUT ANYTHING, RIGHT, THEN YOU WOULD EXPECT THAT THE STOCK PRICE WOULD BE AT THE PRICE IT WAS A MOMENT BEFORE THE TWEET, NOT THAT THE PRICE WOULD BE $44 LOWER.

AND THE REASON -- YOUR HONOR, ARE YOU GOING TO STEP IN? I'LL PAUSE.

THE COURT: I'M CURIOUS. ARE YOU SAYING YOU COULD NEVER HAVE DAMAGES IN A 10B-5 CASE WHERE -- THAT WOULD EXCEED THE FRONT-END INFLATION NUMBER, THAT IS, YOUR BASELINE IS ALWAYS THE PRE-FALSITY NUMBER, YOU COULD NEVER HAVE DAMAGES BELOW THAT -- NEVER HAVE AN END PRICE -- IN OTHER WORDS, I'M -- SO WHY WOULD YOU EVEN LOOK TO THE END -- WHY WOULD YOU LOOK TO THE -- YOU KNOW, USE BACKCASTING, WHATEVER IT'S CALLED, WHERE YOU LOOK BACKWARDS, SEEMS LIKE YOU'RE GOING TO RUN INTO THIS PROBLEM NOT INOFTEN.

I KNOW YOU HAVE TO DISAGGREGATE. IT MAY BE DOWN

BECAUSE OF MARKET CONDITIONS, ET CETERA, ONCE YOU DISAGGREGATE. BUT ARE YOU SAYING IT'S IMPOSSIBLE TO HAVE DAMAGES THAT SORT OF EXCEED THAT FRONT-END INFLATION NUMBER IN A CASE LIKE THIS?

MR. ROSSMAN: WELL, YOUR HONOR. WHAT WE HAVE HERE IS WHAT PLAINTIFFS CONTEND IS A MEASURABLE FRONT END. THE PROBLEM THEY HAVE -- THE PROBLEM THAT THEY HAVE IS THEY CAN'T FIND STATISTICAL SIGNIFICANCE IN CONNECTION WITH ANY OF THE CURATIVE STATEMENTS.

SO, TYPICALLY, WHAT HAPPENS IS COMPANY ISSUES A PRESS RELEASE THAT SAYS, OUR PRIOR EARNINGS WAS IN ERROR, OKAY, AND THAT PRESS RELEASE IMMEDIATELY LEADS TO A STOCK DROP, AND YOU GET THE BACK END, AND THEN YOU MEASURE BACKWARDS, OR BACKCAST FROM THE BACK END. OKAY?

HERE THE PLAINTIFFS HAVE A PROBLEM, BECAUSE IF YOU LOOK AT THE PERIOD BEFORE AUGUST 17TH -- AND THAT'S THE NEW YORK TIMES ARTICLE, AND THAT'S ONE OF THE REASONS WHY WE'RE VERY FOCUSED ON, YOU KNOW -- I HEARD YOUR HONOR'S RULING, OF COURSE.

BUT FOR THE EXPERT, EXPERT'S GOING TO HAVE A DEVIL OF A TIME TRYING TO DISENTANGLE WHATEVER IS NEW INFORMATION THAT HE THINKS HE CAN PARSE OUT FROM THE NEW YORK TIMES ARTICLE ON AUGUST 17TH FROM THAT WHICH WAS ALREADY DISCLOSED IN THE MARKET IN THE AUGUST 13TH BLOGPOST AND PRIOR TO THAT. OKAY? AND HE HAS TO DO THAT. BECAUSE WHAT HE'S GOT TO SHOW IS HE'S GOT TO SHOW IT WAS THE CURATIVE INFORMATION, THE CORRECTIVE

INFORMATION THAT CAUSED THE DECLINE. OKAY?

THEY CAN'T SHOW THAT, SO THEY FUDGE IT. AND THE WAY THEY FUDGE IT, YOUR HONOR, IS THAT THEY TAKE THE STATISTICALLY SIGNIFICANT MOVE ON THE 17TH -- AND THERE'S ONLY TWO THINGS THAT HAPPENED HERE THAT MEET -- YOUR HONOR IS RIGHT ON IT TO ASK, YOU KNOW, WHETHER ANY OF THESE ALLEGED CONSEQUENTIAL HARMS RESULTED IN STATISTICALLY SIGNIFICANT MOVEMENTS IN STOCK PRICES. NONE OF THEM DID. OKAY? NONE OF THEM DID. THEY DON'T HAVE ANY PROOF OF THAT. THEY JUST ASSUME IT.

WHAT THEY ESSENTIALLY DO IS TAKE TWO GOALPOSTS. THEY TAKE AUGUST 7TH, OKAY, WHEN THE TWEETS CAME OUT, AND THEN THEY TAKE AUGUST 17TH WHEN THE NEW YORK TIMES CAME OUT. THE REASON WHY DR. HARTZMARK USES THOSE TWO IS THERE'S STATISTICAL SIGNIFICANCE ON THE FRONT END. OKAY? HE CAN'T FIND STATISTICAL SIGNIFICANCE EXCEPT ON THE 17TH, BUT ON THE 17TH IT'S LOADED WITH CONFOUNDING INFORMATION.

SO EVEN IF THERE IS SOME ADDITIONAL INCREMENT OF CURATIVE OR CORRECTIVE INFORMATION ON THE 17TH COMPARED TO THE 13TH, EVEN IF THERE'S A LITTLE BIT, THERE'S A TON OF MARKET MOVING NON-FRAUD RELATED INFORMATION IN THAT ARTICLE, WHICH IS ALL OF THE INFORMATION ABOUT MR. MUSK'S HEALTH. THAT'S WHAT THE HEADLINE WAS THAT DAY. THAT'S WHAT DOZENS AND DOZENS AND DOZENS AND DOZENS OF ARTICLES WERE ABOUT FOLLOWING THAT, YOU KNOW, TEARFUL NEW YORK TIMES ARTICLE. THAT'S WHAT RULED THE STOCK PRICE THAT DAY, WERE CONCERNS ABOUT MR. MUSK'S HEALTH.

THE COURT: THAT'S GOING TO BE YOUR ARGUMENT TO THE JURY. THAT'S A FACT QUESTION.

AND THE FACT THAT ONE COULD NOT FIND A PARTICULAR MOMENT WHERE THERE'S A STATISTICALLY SIGNIFICANT MOVEMENT DUE TO SOME PARTIAL DISCLOSURE DOES NOT NECESSARILY PREVENT ONE LOOKING AT THE AGGREGATE -- I GUESS HE CALLS IT THE LEAKAGE MODEL -- WHERE YOU COULD HAVE A SERIES, FOR INSTANCE, THEORETICALLY, A SERIES OF DECLINES THAT ARE NOT EACH ONE STATISTICALLY INSIGNIFICANT, BUT IN THE AGGREGATE -- AND IF YOU DO THE PROPER DISAGGREGATION ANALYSIS, I COULD SEE WHERE YOU COULD COME OUT WITH SOMETHING IN THE END.

BUT THE LARGER POINT, THOUGH, IS THAT HE'S DONE SOMETHING SORT OF, IN YOUR VIEW, MORE THAN THAT, AND THAT IS SAYING, WELL, YOU KNOW, THE CONSEQUENCE OF THE -- THE FALSITY AND THE REVELATION OF THE FALSITY OPENS KIND OF A PANDORA'S BOX AND HAS ALL SORTS OF ADDITIONAL IMPACTS ON STOCK, WHICH SHOULD BE INCLUDED, WHICH SHOULD BE COGNIZABLE, AND YOU'RE SAYING, WELL, CASE LAW DOESN'T SUGGEST THAT.

MR. ROSSMAN: RIGHT. WELL, YOUR HONOR, I GUESS I WOULD PUT IT TO YOU IN THIS WAY, OKAY? BEFORE THE QUESTION SHOULD GET TO THE JURY, YOUR -- YOU KNOW, YOUR ROLE AS GATEKEEPER IN A DAUBERT MOTION IS TO CONSIDER WHETHER HIS MODEL GIVES THEM TOOLS TO BE ABLE TO DETERMINE WHAT THEY ARE CHARGED WITH DETERMINING HERE, WHICH IS WHAT PORTION OF THE LOSS IS CHARGEABLE TO FRAUDULENT STATEMENTS, AND FRAUDULENT STATEMENTS

BEING REVEALED, AS OPPOSED TO OTHER THINGS, EITHER INDISPUTABLY TRUE STATEMENTS LIKE WE HAVE ON THE FRONT END, WHICH IS MR. MUSK'S STATEMENT THAT, YOU KNOW, I'M CONSIDERING TAKING TESLA PRIVATE AT 420, WHICH THEY DO NOT DISAGGREGATE -- OKAY? WE'LL GO BACK TO THAT IN A MINUTE IF YOUR HONOR WILL PERMIT ME. -- AND THE AUGUST 17 NEW YORK TIMES ARTICLE WHICH HAS THE CONFOUNDING INFORMATION REGARDING MR. MUSK'S HEALTH, WHICH IS THE SUBJECT OF PAGES AND PAGES AND PAGES AND PAGES OF ARTICLES WHICH ARE CITED IN MR. HARTZMARK'S OPINION, AS OPPOSED TO ONE SINGLE ARTICLE, YOU KNOW, THAT'S CITED BY NO ONE THAT MR. PORRITT SUGGESTS THAT THE WORLD KNEW ABOUT, YOU KNOW, MR. MUSK'S HEALTH.

THERE'S -- IT'S A DRAMATICALLY DIFFERENT SITUATION THAT CAUSED THE STOCK TO MOVE, AND THE QUESTION IS DOES THIS EXPERT PROVIDE A RELIABLE, A TESTABLE, CROSS-EXAMINABLE MODEL THAT COULD ALLOW US TO DETERMINE WHAT PORTIONS OF THE ALLEGED FRAUD ARE ACTUALLY CAUSING HARM HERE.

AND, YOUR HONOR, IT SHOULD BE, YOU KNOW, SURPRISING, GIVEN THE SHEER NUMBER OF SECURITIES CASES THAT THERE HAVE BEEN, YOU KNOW, CERTAINLY SINCE THE PSLRA WAS ADOPTED, THAT NO ONE, NO COURT, NONE THAT THEY'VE CITED, NONE THAT WE'VE SEEN, HAS FOUND A CONSEQUENTIAL DAMAGES MODEL BASED ON MOVEMENT IN THE STOCK PRICE.

IT'S AN ENTIRELY DIFFERENT THING WHEN YOU'RE TALKING ABOUT OUT-OF-POCKET OUTLAY, LIKE THE EXAMPLE I GAVE IN THE

AMBASSADOR HOTELS CASE, THE ONLY CASE THEY CITE, THEN WHEN YOU'RE SAYING THERE ARE KNOCK-ON EFFECTS TO STOCK PRICE, AND THE CASE LAW IS PRETTY CLEAR, LIKE *OMNICOM* SAYS, SUBSEQUENT KNOCK-ON EFFECTS, IF YOU WILL, MEDIA COVERAGE AND SO FORTH, THEY DON'T -- THEY DON'T COUNT AS LOSSES THAT ARE OUT-OF-POCKET LOSSES.

THE COURT: WHAT HAPPENS -- WHAT HAPPENS IF WE HAVE A SITUATION WHERE SOMEBODY DOES DO AN ADEQUATE DISAGGREGATION ANALYSIS, DOES TAKE INTO ACCOUNT -- INTO EFFECT, TRUTHFUL STATEMENTS, ALONG WITH THE FALSE STATEMENTS, DOES TAKE INTO EFFECT ALL THE CONFOUNDING FACTORS, LIKE, YOU KNOW, THE ECONOMY AND OTHER THINGS THAT WOULD AFFECT, AND AFTER YOU STRIPPED THAT ALL AWAY, YOU STILL END UP WITH A BIG NUMBER, A BIGGER THAN AN UPFRONT NUMBER, WHICH THEN IMPLIEDLY SAYS, WELL, IT'S NOT JUST THE FALSITY ITSELF, BUT IT'S SORT OF THE CONSEQUENCE OF THE FALSITY IN TERMS OF THE FUTURE, YOU KNOW, OF THE COMPANY AND THE LEGAL PROBLEMS YOU ARE GOING TO FACE?

WOULD IT BE YOUR VIEW THAT EVEN AFTER, LET'S SAY, AN ADEQUATE DISAGGREGATION ANALYSIS THAT TAKES INTO ACCOUNT ALL NON-FALSITY-RELATED CONFOUNDING FACTORS, THAT THERE'S STILL A SORT OF LEGAL BARRIER, THAT'S JUST THE KIND OF CAUSAL FACTOR YOU SHOULD NOT BE ABLE RECOVER FOR?

MR. ROSSMAN: I DO, YOUR HONOR -- AND WE'RE TALKING ABOUT HERE, OKAY, A FRAUD-ON-THE-MARKET CASE. AND THE ESSENCE OF THE FRAUD-ON-THE-MARKET PRESUMPTION BASIC IS THAT ALL

INFORMATION IS EMBEDDED IN THE STOCK PRICE, INCLUDING POTENTIAL RAMIFICATIONS OF THAT INFORMATION.

SO THE EXPECTATION IS THAT THE PRICE -- WHEN THE TRUTH IS KNOWN, OKAY, WHEN THE TRUTH IS REVEALED, THAT INVESTORS WILL IMMEDIATELY TAKE INTO -- WILL TAKE INTO ACCOUNT IN THE TRADING OF THAT STOCK THE EXPECTATION OF OTHER CONSEQUENCES THAT MAY BEFALL THE COMPANY, WHETHER THEY BE REGULATORY INVESTIGATIONS, WHETHER THEY BE LAWSUITS, WHETHER THEY BE BAD PUBLICITY, WHETHER THEY BE CHANGES TO MANAGEMENT.

THOSE THINGS THAT HAPPEN LATER ON, OKAY, ARE ALREADY CRYSTALLIZED IN WHERE THE STOCK TRADES ON A GIVEN DAY. SO IT'S DOUBLE COUNTING, IN EFFECT, YOUR HONOR, TO ALLOW THEM TO COUNT THAT AS CONSEQUENTIAL DAMAGES IN ADDITION TO THE DIRECT DAMAGES, AND I WOULD SUGGEST THERE'S NO PRECEDENT FOR IT FOR GOOD REASON. AND --

THE COURT: WELL, BUT WHAT YOU JUST SAID -- AND IT SOUNDED INTERESTING -- IF, AT THE END OF THE DISCLOSURE PERIOD, AND YOU'VE ELIMINATED CONFOUNDING FACTORS THROUGH APPROPRIATE DISAGGREGATION, YOU ARE LEFT WITH A -- LET'S SAY A VERY LOW PRICE BECAUSE WHAT'S BAKED INTO THE PRICE AT THAT POINT IS NOT ONLY THE REVELATION OF THE FRAUD, BUT, LET'S SAY, DISCLOSURE OF SERIOUS MANAGEMENT PROBLEMS. AND THERE'S GOING TO BE DISRUPTION. WE NOW KNOW THAT WHOEVER THE CEO IS IS GOING TO BE GONE, WE NOW KNOW THE BOARD OF DIRECTORS -- THERE'S GOING TO BE A BIG SHAKEUP IN THE COMPANY.

THAT, AS YOU JUST SAID, IS KIND OF ALREADY TAKEN INTO ACCOUNT, BUT ISN'T THAT WHAT THEIR EXPERT HAS DONE, IS SAYING, WELL, YOU LOOK AT IT, AND IT WENT ALL THE WAY DOWN TO 3- -- WHATEVER IT IS -- -19 OR SOMETHING, THAT REFLECTS THE SHAREHOLDERS' VIEW THAT THERE'S SOME DEEPER PROBLEMS NOW THAT HAVE BEEN REVEALED. SO WHY IS THAT NOT APPROPRIATE TO TAKE INTO ACCOUNT?

MR. ROSSMAN: SO HERE'S THE PROBLEM THAT WE HAVE, YOUR HONOR, AND WHY WE MAKE THIS DAUBERT MOTION, OKAY? IF THE JURY WERE TO DETERMINE THAT THE NEW YORK TIMES ARTICLE IN PART, LET'S SAY, OKAY, MOVES THE STOCK PRICE BECAUSE OF CONCERNS ABOUT MR. MUSK'S HEALTH AND IN PART MOVES THE STOCK PRICE -- AND I DON'T ACCEPT THIS, YOUR HONOR -- I'M JUST KIND OF FOLLOWING ALONG PLAINTIFF'S PLAYBOOK.

BUT IF THE OTHER PART, PLAINTIFFS WILL CLAIM, IS THERE'S SOME NEW REVELATION IN THE NEW YORK TIMES ARTICLE, OKAY, THEN THE JURY HAS NO TOOLS AVAILABLE TO IT TO GIVE A DAMAGES AWARD BASED ON THE SPLIT BETWEEN THOSE TWO, BECAUSE THEY'RE ALL LUMPED TOGETHER, UNDIFFERENTIATED IN DR. HARTZMARK'S REPORT.

AND THE FAILURE TO MAKE THAT DISAGGREGATION, EVEN THE ONE AND ONLY CASE THEY CITE FOR THE PROPOSITION YOU COULD HAVE A LEAKAGE MODEL -- IT'S NEVER BEEN ADOPTED IN THE NINTH CIRCUIT, BUT THE *HOUSEHOLD* CASE IN THE SEVENTH CIRCUIT, OKAY? IT'S OUR EXPERT, SO HE KNOWS OF WHAT HE SPEAKS WHEN HE SAYS THE

LEAKAGE MODEL DOESN'T WORK HERE. OKAY? BUT IN THE *HOUSEHOLD* CASE THE CONFOUNDING INFORMATION WAS ELIMINATED. OKAY?

HERE, HERE WHAT HAPPENS IS, ESSENTIALLY, DR. HARTZMARK JUST IGNORES THE CONFOUNDING INFORMATION. WE KNOW THERE'S TRUTHFUL INFORMATION THAT HAS THE POTENTIAL TO MOVE THE MARKET IN THE AUGUST 7TH TWEET, RIGHT? YOUR HONOR OBSERVED IT.

"I'M CONSIDERING TAKING TESLA PRIVATE AT 420," IF THAT'S ALL MR. MUSK SAID ON THAT DAY AND SAID NOTHING FURTHER, RIGHT, IT WOULD BE YOU'D HAVE TO IMAGINE PLAINTIFFS' CASE THAT THAT WOULDN'T MOVE THE STOCK PRICE AT ALL. THAT'S NOT PROVEN, AND IT'S NOT REALLY PLAUSIBLE, YOUR HONOR. OKAY?

THEN ON THE BACK END, ON AUGUST 17TH, YOU'VE GOT THE NEW YORK TIMES ARTICLE WITH REVELATIONS ABOUT MR. MUSK'S HEALTH THAT HAVE NOTHING TO DO WITH FRAUD. OKAY?

THE COURT: THAT'S WHY I SAID WITH MR. PORRITT THAT, AT THE END OF THE DAY, THE DEBATE REALLY SEEMS TO BE ABOUT THIS EXPERT'S, IN YOUR VIEW, FAILURE TO ACCOUNT FOR LOTS OF CONFOUNDING INFORMATION, AND TRUTHFUL INFORMATION; THE FRONT END, THE BACK END. IT'S NOT SO MUCH WHETHER WE CALL IT A LEAKAGE MODEL. IT'S NOT SO MUCH WHETHER YOU CALL IT CONSEQUENTIAL, BECAUSE IT'S -- REALLY THE -- I THINK, FROM YOUR POSITION, THE FAILURE TO DEAL ADEQUATELY WITH ALL THIS NON-RELATED INFORMATION.

BUT THAT SEEMS TO BE -- AND THAT SEEMS TO ME PERFECT

FODDER FOR CROSS-EXAMINATION. I CAN IMAGINE WHAT THAT'S GOING TO LOOK LIKE, AND I DON'T KNOW THAT THAT -- THAT THAT'S A DAUBERT ISSUE.

MR. ROSSMAN: WELL, YOUR HONOR, I'LL SAY THIS: THE PROBLEM THAT I HAVE IS THE NATURE OF THE REPORT THAT JUST ASSUMES THAT EVERYTHING THAT HAPPENS FROM THE INITIAL TWEET TO -- ALL THE WAY TO THE AUGUST 17 NEW YORK TIMES REPORT WITHOUT SEPARATION, IT SWEEPS WITHIN IT A TREMENDOUS AMOUNT OF INFORMATION AND ACTIVITY WITH NO PROOF THAT ANY OF IT HAD STATISTICAL SIGNIFICANCE.

SO, FOR EXAMPLE, YOUR HONOR POINTED OUT THE CONSEQUENTIAL DAMAGES. MR. PORRITT ESSENTIALLY SAYS, WE CAN IGNORE OTHER CONFOUNDING INFORMATION BECAUSE THE CONFOUNDING INFORMATION ALLEGEDLY DIDN'T HAVE STATISTICAL SIGNIFICANCE, BUT, YET, THEY'RE GOING TO INCLUDE ALL OF THESE CONSEQUENTIAL DAMAGES, EVEN THOUGH THEY CAN'T SHOW THAT THERE'S ANY STATISTICAL SIGNIFICANCE FOR ANY OF THE CONSEQUENTIAL HARMS. AND THAT'S TWO-THIRDS OF THE DAMAGE CLAIM.

THEN THERE'S A MODEL WITH NO ABILITY FOR THE JURY, YOUR HONOR, TO DISENTANGLE IT AND COME TO A DAMAGES AWARD, IF THEY MUST -- IF THEY AWARD DAMAGES, THAT'S DIRECTLY ATTRIBUTABLE TO THE FRAUD STATEMENTS AND ONLY THE FRAUD STATEMENTS.

THAT'S THE PROBLEM THAT WE HAVE, YOUR HONOR.

THE COURT: THANK YOU. LET ME TURN BACK TO

MR. PORRITT.

WHAT CASE -- IS THERE ANY CASE YOU CAN CITE THAT HAS RECOGNIZED THAT, WHETHER YOU CALL IT CONSEQUENTIAL DAMAGES OR BAKED INTO THE SHAREHOLDER ASSESSMENT, YOU KNOW, NUMBERS AT THE END -- TAIL END AFTER THE REVELATION AND THE CORRECTIVE DISCLOSURES, THAT DAMAGES OR DEPRESSION OF STOCK PRICES DUE TO SHAREHOLDER UNDERSTANDING OF POTENTIAL REGULATORY CONSEQUENCES, MANAGEMENT ISSUES, STUFF LIKE THAT, IS THE KIND OF THING THAT IS RECOVERABLE IN A SECURITIES ACTION LIKE THIS?

MR. PORRITT: JUST TO RESTATE -- ADDRESS SOMETHING THAT MR. ROSSMAN SAYS, DON'T FORGET IT'S ONLY REFLECTED -- IT'S ONLY RECOVERABLE TO THE EXTENT IT DIRECTLY IMPACTS THE STOCK PRICE, WHICH MEANS IT DOES DIRECTLY CREATE AN OUT-OF-POCKET LOSS. SO THAT CREATES YOUR OUT-OF-POCKET LOSS. SO A STOCK BOUGHT AT 380 IS NOW WORTH 312.90, TAKING INTO ACCOUNT MARKET EFFECTS. THAT'S AN OUT-OF-POCKET LOSS. SO THAT'S POINT ONE.

AND MR. ROSSMAN'S ARGUMENT, ESSENTIALLY, IT'S JUST A REPRISE, IN MANY WAYS, OF ARGUING THAT BY AUGUST 13 THERE WAS A COMPLETE CORRECTIVE DISCLOSURE, WHICH, AS YOUR HONOR HAS WIDELY IDENTIFIED, IS A VERY MUCH A DISPUTED FACT.

SO IF IT'S NOT A COMPLETE CORRECTED DISCLOSURE, THEN MARKET PRICE REACTIONS ON AUGUST 17TH -- WHICH IS UNQUESTIONABLY A STATISTICALLY SIGNIFICANT PRICE REACTION, CAN -- YOU KNOW, IS RESULTING FROM THE FRAUD. IT'S RESPONDING TO THE FRAUD. NOW YOU CAN DEBATE ABOUT THE DEGREE TO WHICH

IT'S RESPONDING TO THE FRAUD, BUT IT'S NO QUESTION THAT IT'S RESULTING FROM THE FRAUD.

AND FINALLY --

THE COURT: BUT THE QUESTION IS, IF IT'S RESPONDING TO THE FRAUD, BECAUSE NOW THEY KNOW FUNDING IS NOT SECURED. OKAY?

MR. PORRITT: RIGHT.

THE COURT: EVERYBODY KNOWS THAT SHOULD BE RECOVERABLE.

BUT IF THEY'RE RESPONDING TO THE FRAUD BY SAYING, UH-OH, THIS PROBABLY MEANS SEC PROBLEMS ARE AROUND THE CORNER, OR THIS MAY MEAN CHANGE IN THE COMPOSITION OR STRUCTURE -- THERE'S GOING TO BE SOME UPHEAVAL IN TESLA AS A RESULT, WHO KNOWS WHAT'S GOING TO HAPPEN, YOU KNOW. YOUR VIEW, I GUESS, IS, WELL, IF THAT'S BAKED INTO THE PRICE, THAT'S BAKED INTO THE PRICE IF THAT'S WHAT SHAREHOLDERS CONSIDER, EVEN THOUGH IT'S NOT -- WHAT THEY'RE CONSIDERING IS SORT CONSEQUENCES. THAT'S THE PROBLEM. THEY'RE SORT OF CONSIDERING CONSEQUENCES BEYOND -- THEY'RE KIND OF DERIVATIVE CONSEQUENCES, SECOND GENERATION.

YOUR POSITION IS, WELL, IF IT IS, IT IS, IT'S STILL CAUSALLY RELATED, AND, THEREFORE, IT CAUSED AN OUT-OF-POCKET LOSS, I CAN SEE AN ARGUMENT THAT -- WELL, I'M NOT SURE THAT'S WHAT SECURITY LAWS ARE SUPPOSED TO TAKE INTO ACCOUNT.

MR. PORRITT: WELL, FIRST OF ALL, IT'S NOT -- WE

WOULD ARGUE IT'S STILL VERY PROXIMATE BECAUSE THIS IS AN SEC INVESTIGATION, REGULATORY RISK CREATED BY THE FACT THAT ELON MUSK GAVE, YOU KNOW, A FRAUDULENT TWEET ON AUGUST 7TH. NO FRAUDULENT TWEET, NO REGULATORY RISK.

SO IN THAT EXTENT, IT'S VERY DIRECTLY AND PROXIMATELY RELATED TO THE ALLEGATIONS OF FRAUD HERE.

AND, SO, THAT IS, YOU KNOW -- AND MR. ROSSMAN, YOU KNOW, I'M SURE INADVERTENTLY COMPLETELY MISREPRESENTED THE THEORY OF WHERE THE 312.90 COMES FROM, WHICH IS THE 312.90 IS THE PRICE THAT WOULDN'T HAVE HAPPENED IF THE FRAUDULENT TWEETS WERE MADE AND HAD BEEN EXPOSED ON AUGUST 7TH.

THEN THAT'S CONSISTENT THROUGHOUT. YOU WOULD HAVE HAD IMMEDIATE DECLINE BECAUSE YOU HAVE ALL THIS REGULATORY RISK OF CONSEQUENTIAL HARM OCCURRING. THAT WAS SORT OF FIXED. IT WAS BAKED INTO THE STOCK PRICE. IT'S JUST A QUESTION OF WHEN IT'S REVEALED.

THIRDLY, I WOULD SAY, YOUR HONOR, YOUR HONOR ACCURATELY CAPTURED THE IDEA THAT, UNDER MR. ROSSMAN'S THEORY, YOU WOULD NEVER HAVE ANY DAMAGES IF THE -- THERE WAS NO PRICE IMPACT UP FRONT, WHICH HAS BEEN A THEORY THAT DEFENDANTS HAVE BEEN RUNNING OUT NOW IN MULTIPLE COURTS ALL OVER THE COUNTRY, AND IT'S BEEN REJECTED TIME AFTER TIME AFTER TIME, INCLUDING MOST RECENTLY THE *GOLDMAN SACHS* CASE WITH THE SUPREME COURT, WHICH SAID QUITE CLEARLY, YOU DON'T NEED BACK END AND FRONT END IMPACT, YOU DON'T NEED FRONT END IMPACT NECESSARILY.

SO YOU NEED -- YOU NEED TO HAVE A PLAUSIBLE EXPLANATION FOR GETTING FROM POINT A, AT THE BEGINNING OF THE CLASS PERIOD, TO B, THE END OF THE CLASS PERIOD.

I DON'T THINK THERE COULD BE ANY QUESTION THAT DR. HARTZMARK AND PLAINTIFFS HERE HAVE LAID OUT FOR THE JURY AND EXPLAINED IN PAINSTAKING DETAIL, BASED UPON MARKET REACTION ANALYSIS, HOW WE GET FROM POINT A TO POINT B AT THE END OF THE CLASS PERIOD.

NOW, LOOK, DEFENDANTS -- PLAINTIFFS MAY -- AND WE DON'T SEE ANY REASON -- DR. HARTZMARK HAS CONSIDERED ALL THIS SUPPOSEDLY CONFOUNDING INFORMATION.

MR. ROSSMAN SAID THERE'S TONS, AND TONS, AND TONS OF CONFOUNDING INFORMATION. WELL, DR. HARTZMARK IDENTIFIED, AFTER LOOKING AT EVERY SINGLE NEWS ITEM DURING THE CLASS PERIOD, OVER 2,400, HE LAYS THEM OUT ON PAGE 106 OF HIS EXPERT REPORT, AND HE CONSIDERS EVERY SINGLE ONE. SO TO SAY HE JUST IGNORES THEM OR ASSUMES THEM AWAY IS JUST -- IS JUST WRONG. THAT'S JUST FLAT OUT -- FLAT OUT INCORRECT STATEMENT.

THE COURT: AS I UNDERSTAND YOUR POSITION THAT, YES, ALL THE CONFOUNDING FACTORS HAVE BEEN DISAGGREGATED ADEQUATELY, AND IF WHAT YOU'RE LEFT WITH AFTER APPROPRIATE METHODOLOGY TO VET OUT NON-FALSITY, NON-FRAUD RELATED CAUSES IS TAKEN INTO ACCOUNT, AND YOU'RE LEFT WITH A SHAREHOLDER PRICE, A SHARE PRICE, THAT IS LOWER THAN EVEN BEFORE THE FRAUD HAPPENED, BECAUSE OF THE CONSEQUENCES, THAT THAT STILL IS AN

OUT-OF-POCKET LOSS.

BUT I TAKE IT -- AND I SEE FROM YOUR BRIEF YOU DON'T HAVE A CASE WHERE THAT -- SOME COURT HAS RECOGNIZED THAT EXPRESSLY, WITH THE IDEA THAT, WELL, EVEN THOUGH THAT LOWERED SHARE PRICE REFLECTS SHAREHOLDER CONCERN, NOT ONLY, YOU KNOW, CORRECTING THE FRAUD AND IGNORING TRUTH OF THE TRANSACTION, THE TRUTH OF THE FINANCIAL STATE, BUT KNOWING THE CONSEQUENCES OF THAT IN TERMS OF CORPORATE GOVERNANCE, CORPORATE FUTURE, THAT SORT OF THING, NO COURT HAS OPINED ONE WAY OR THE OTHER WHETHER THAT SHAREHOLDER RECOGNITION, AS IT'S BAKED INTO THE PRICE, IS NONETHELESS APPROPRIATE.

MR. PORRITT: WELL, I WOULD RESPOND IN THE FOLLOWING WAY, WHICH IS, FIRST OF ALL, MR. ROSSMAN CITED *AFFILIATED YOUTH*, THE VENERABLE SUPREME COURT DECISION, WHICH STRESSES THAT REMEDIES FOR AND DAMAGES RECOVERABLE FOR THE INVESTORS, THE VICTIMS OF FRAUD, YOU KNOW, SHOULD BE -- SHOULD BE -- (AUDIO TRANSMISSION DIFFICULTY) THAT THEY ARE VICTIMS OF FRAUD, AND FRAUD DOERS ARE DISFAVORED UNDER THE COMMON LAW AND UNDER THE SECURITIES LAWS, SUCH AS MR. MUSK, SHOULD THE JURY FIND THAT HE COMMITTED FRAUD.

SO IN THAT CASE, FOR INSTANCE, THEY WILL ALSO AGREE -- I AGREE THERE WAS, AT SOME POINT, A LINE OF PROXIMATE CAUSE IN THE SAND. I CERTAINLY AGREE WITH THAT, BUT I THINK IT'S NOT -- I DON'T THINK IT'S REMOTELY A STRETCH TO SAY THE CHAIN OF PROXIMATE CAUSATION RUNS FROM AUGUST 7TH TWEETS

THROUGH TO THE AUGUST 17 REACTION TO THE NEW YORK TIMES ARTICLE AND THE GENERAL REALIZATION, AS REFLECTED BY THE J.P. MORGAN ANALYST, THAT THE DEAL -- THAT FUNDING IS, IN FACT, NOT SECURED; THAT, IN FACT, THAT THERE WAS NO INVESTOR SUPPORT; AND, IN FACT, THERE IS NO FORMAL PROPOSAL, AND ALL WE ARE LEFT WITH IS JUST A GLINT IN MR. MUSK'S EYE ABOUT GOING PRIVATE SOME DAY.

I WOULD SAY, IN TERMS OF CASE LAW -- I MEAN PART OF THE REASON IS THERE IS NO CASE LAW, THESE CASES RARELY GO TO TRIAL, AS YOUR HONOR IS AWARE. SO THESE CASES TEND NOT TO GET FLESHED OUT UNTIL YOU GET TO THIS STAGE.

I'D SAY WE CITED THE *FIRST SOLAR* CASE, WHICH TALKS ABOUT ASPECTS OF CONFOUNDING INFORMATION. WE DO LOOK AT -- WE ALSO CITED THE *LLOYD* CASE, WHICH EXPRESSLY TALKS ABOUT HOW -- AND RECOGNIZES IN THIS CIRCUIT THAT THE ANNOUNCEMENT OF A GOVERNMENT INVESTIGATION CAN BE A REALIZATION OF THE RISK. IT CAN BE A REALIZATION OF LOSS, MATERIALIZATION OF LOSS.

WELL, THAT, IN AND OF ITSELF, NECESSARILY CONTAINS NOT JUST A -- AN ASSESSMENT OF THE LOSS, IF YOU LIKE, TO THE COMPANY FROM -- YOU KNOW, THAT BUSINESS OR OPERATIONS ITSELF ARE FRAUD, BUT ALSO THE REGULATORY RISK. AND THERE WAS NO -- I MEAN, THE NINTH CIRCUIT ACCEPTED THAT AND HELD THAT, YOU KNOW, QUITE STRONGLY.

SO I DON'T THINK THAT IS -- SO THAT, I WOULD ARGUE, IS SUPPORT FOR THE FACT THAT --

THE COURT: WELL, DIDN'T THAT INVOLVE FAILURE TO DISCLOSE?

MR. PORRITT: SORRY, YOUR HONOR?

THE COURT: DID THAT INVOLVE -- DID *LLOYD* INVOLVE FAILURE TO DISCLOSE SUCH INVESTIGATION?

MR. PORRITT: NO, IT WAS A GOVERNMENT INVESTIGATION AS A RESULT OF A -- IN CONNECTION WITH THE SUBJECT MATTER, I BELIEVE, OF THE FRAUD.

AND, YOU KNOW, CITING TEACHERS -- YOU KNOW, THE TEACHERS, THE *HUNTER* CASE, THE *CREE* CASE IN THE FOURTH DISTRICT -- FOURTH CIRCUIT, IS REALLY -- THAT CASE -- THE COMPLAINT WAS FILED YEARS AFTER THE EVENTS IN QUESTION, AND IT WAS A FOUR-PAGE COMPLAINT WRITTEN BY -- IT'S PART OF AN INTERFAMILY DISPUTE.

THE FACT SITUATION IS REALLY ENTIRELY DIFFERENT FROM THE CASE WE HAVE HERE, WHERE THE DISCLOSURES ARE TAKING PLACE OVER AN EIGHT-DAY PERIOD.

SO THIS IS NOT LIKE WE'RE ASKING FOR A DROP THAT OCCURRED YEARS AFTER THE MISREPRESENTATION HERE. THIS IS VERY CLOSELY TIED.

THE COURT: AND YOU WOULD ARGUE THAT THE KIND OF QUALITATIVE INFORMATION THAT THE SHAREHOLDERS WERE TAKING INTO -- THAT, IN ADDITION TO JUST THE FACT OF THE NOT SECURED FUNDING WAS MADE APPARENT DURING THE CLASS PERIOD AS A RESULT OF THE SEC -- ANNOUNCEMENT AND SUBPOENA AND --

MR. PORRITT: WE SEE VERY CLEAR MY PRICE REACTIONS TO THOSE STORIES. THERE IS A -- ONCE AGAIN, JUST TO BE CLEAR, THERE'S NO MAGIC AND NECESSARILY STATISTICAL SIGNIFICANCE. THERE'S NO LEGAL REQUIREMENT. THE NINTH CIRCUIT ACTUALLY MADE THAT VERY CLEAR. SO IT'S -- AND NONETHELESS, YOU KNOW, IT'S A TEST -- YOU KNOW, IF YOU OBTAIN STATISTICAL SIGNIFICANCE ABOVE FIVE PERCENT, WHICH IS KIND OF A RULE OF THUMB, THAT SEEMS LIKE A SAFE HARBOR, BUT IT DOESN'T MEAN IF YOU DON'T MAKE IT, YOU AUTOMATICALLY FAIL --

THE COURT: LET ME --

MR. PORRITT: THERE'S A VERY CLOSE TO -- A VERY SIGNIFICANT MARKET REACTION TO THE ANNOUNCEMENT OF THE SEC INVESTIGATION THAT IS NEGATIVE HERE THAT'S OBSERVED IN THE STOCK PRICE AT TESLA.

SO I THINK THIS DEBATE HAS SHOWN VERY CLEARLY, YOUR HONOR, THEY HAVE VALID CROSS-EXAMINATION POINTS, BUT I MEAN THIS IS -- I THINK AS YOUR HONOR APTLY PUT IT, THIS IS A DEBATE OVER THE APPLICATION OF A METHOD OF AN APPROPRIATE DAUBERT SITUATION.

THE COURT: LET ME GIVE MR. ROSSMAN A CHANCE TO RESPOND TO MR. PORRITT'S CITATION OF THE *LLOYD* CASE WHERE GOVERNMENT INVESTIGATION CAN CONTRIBUTE TO REALIZATION OF LOSS. ISN'T THAT ANALOGOUS HERE?

MR. ROSSMAN: YOUR HONOR, JUST TO ANSWER THE *LLOYD* QUESTION, MY UNDERSTANDING IS THAT IS ONE WHERE THE SEC

INVESTIGATION REPUTED THE FRAUD -- I'M SORRY -- REVEALED. I FAILED TO READ MY WRITING. A BIG DIFFERENCE.

THAT'S -- THAT IS WHERE THE -- WHAT WE TYPICALLY SEE, WHICH IS THE CORRECTED INFORMATION HITTING THE MARKET IN THE FORM OF THE SEC INVESTIGATION, AND YOU SEE THE STOCK PRICE MOVING IN RESPONSE TO THAT, NOT THESE KNOCK-ON EFFECTS OF CONSEQUENTIAL DAMAGES, WHICH IS WHY WE DON'T SEE ANY CASES IN CONTEXT ON THAT.

IF YOUR HONOR WILL INDULGE ME FOR A MINUTE, I ANTICIPATED THE QUESTION OF, YOU KNOW, HOW THIS WOULD GO TO THE JURY. I ASKED DR. HARTZMARK IN HIS DEPOSITION:

> "DID YOU DO ANY ANALYSIS THAT ALLOWS YOU TO SEPARATE HOW MUCH THE MARKET MOVES WERE ATTRIBUTABLE TO THE STATEMENT, 'AM CONSIDERING TAKING TESLA PRIVATE AT 420,' VERSUS THE FUNDING SECURED PORTION OF THE STATEMENT?"

HIS COMPLETE ANSWER TO THAT QUESTION WAS "NO." OKAY? HE DIDN'T DO ANY ANALYSIS TO SEPARATE THOSE TWO. THE PRECISE SAME WOULD BE TRUE IF I ASKED HIM THAT QUESTION WITH RESPECT TO THE NEW YORK TIMES ARTICLE, DID HE DO ANYTHING TO SEPARATE THE PORTIONS THAT WERE NEW INFORMATION ABOUT MR. MUSK'S HEALTH COMPARED TO THE PORTIONS THAT HE CLAIMS WERE NEW REVEALS, THAT LEAVES ME WITH NOTHING TO CROSS-EXAMINE HIM FURTHER ON. IT'S THE ENTIRE --

THE COURT: YOU MAY NOT NEED TO. YOU ARE GOING TO SUGGEST TO THE JURY THAT HIS WHOLE TESTIMONY RISES AND FALLS ON WHAT YOU ARE GOING TO SAY IS INCREDIBLE ASSUMPTION THAT THE DISCLOSURE THAT, I'M GOING PRIVATE WITH 420, THEN THE OTHER DISCLOSURE AT THE BACK END ABOUT ALL HIS HEALTH PROBLEMS HAD NOTHING TO DO WITH IT, AND IF HE STANDS AND SAYS, WELL, THEY HAD NO IMPACT AT ALL, THOSE WERE -- THOSE WERE NOT CONFOUNDING FACTORS, BECAUSE THEY WERE ALL WELL KNOWN, AND BLAH-BLAH-BLAH-BLAH, YOU ARE GOING TO ARGUE, WELL, THIS WHOLE THING GOES OUT THE WINDOW.

BUT, TO THE EXTENT HE HAS ANY BASIS -- AND HE HAS SOME -- TO SAY, WELL, HERE'S WHY I DIDN'T CONSIDER IT, BECAUSE EVERYBODY KNEW HE WAS GOING TO GO -- YOU KNOW, HE WANTED TO GO PRIVATE, AND THEN WHEN HE ANNOUNCED LATER ON AND IT CAME OUT LATER WHEN YOU HAVE THE FACTOR SHOWING, YOU KNOW, IT DIDN'T HAVE ANY IMPACT ON PRICE, OR NOT A STATISTICALLY SIGNIFICANT IMPACT ON PRICE, HE'LL HAVE SOME REASON TO SORT OF DEFEND THAT. AND I THINK THAT'S ALL IT TAKES TO GET PAST DAUBERT. THAT'S NOT TO SAY, YOU KNOW, HIS TESTIMONY -- CONCEIVABLY, A JURY MIGHT FIND THAT ALL GOES DOWN THE TUBES.

MR. ROSSMAN: WELL, YOUR HONOR, I THINK THE HARD QUESTION FOR YOU -- AND, OF COURSE, YOUR HONOR GETS ALL THE HARDEST QUESTIONS -- IS WHAT IF THE JURY FINDS IT'S A MIXTURE OF BOTH?

WHAT IF THE JURY FINDS THAT SOME OF THE INFORMATION

ON AUGUST 7TH IS TRUTHFUL AND MATERIAL AND WOULD HAVE MOVED THE MARKET, SOME OF THE INFORMATION IS NOT? SAME THING FOR AUGUST 17TH. WHAT IF IT FINDS IT'S A MIXTURE OF BOTH OF THOSE THINGS?

IS YOUR HONOR'S VIEW THAT, AT THAT POINT, WE'RE ENTITLED TO THROW OUT THE DAMAGE REPORT AND THERE ARE NO DAMAGES, OR IS THE JURY SUPPOSED TO MAKE A GUESS ABOUT HOW TO A APPORTION DAMAGES BETWEEN --

THE COURT: WELL --

(SIMULTANEOUS COLLOQUY.)

MR. ROSSMAN: -- FROM THIS EXPERT?

THE COURT: THAT'S WHY THERE MAY BE A PREMIUM ON THE INSTRUCTION ON WHO HAS THE BURDEN OF PROOF, BECAUSE IF THE PLAINTIFF HAS THE BURDEN OF PROOF AND THE JURY FINDS THAT THE ALL-OR-NOTHING THEORY DOESN'T FLY AND THEY'RE LEFT WITH NOTHING, YOU'LL HAVE A PRETTY GOOD ARGUMENT. I'M NOT GOING TO SAY WHO'S GOING TO WIN. YOU'LL HAVE A PRETTY GOOD ARGUMENT THEY DIDN'T CARRY THEIR BURDEN OF PROOF AND THEY'RE LEFT WITH ZERO EVIDENCE.

I'M NOT SURE IT'S A DAUBERT QUESTION. THAT'S A JURY QUESTION.

BUT, YOU KNOW, I THINK THE PLAINTIFF IS -- MAYBE THEY'RE, YOU KNOW, PUTTING THEIR EGGS IN ONE BASKET. I DON'T KNOW. BUT THAT'S...

ALL RIGHT. THIS ACTUALLY HAS BEEN VERY HELPFUL.

ACTUALLY, I THINK I HAVE A BETTER UNDERSTANDING, AND I -- YOU KNOW, IT'S A TOUGH -- THIS IS KIND OF -- I WILL SAY THIS IS A BIT UNPRECEDENTED, BECAUSE, ESSENTIALLY -- ESPECIALLY ON THE QUESTION OF MEASURING THE LARGER MEASURE OF DAMAGES, I UNDERSTAND THE THEORY, THAT IT IS BASED STILL ON AN OUT-OF-POCKET THEORY, IT IS STILL BASED ON BUT FOR THE FRAUD, ET CETERA, ET CETERA, BUT IT IS -- IT DOES IMPLICITLY ACCEPT THE NOTION THAT A JURY -- AND A PRICE EFFECT DUE TO WHAT MIGHT BE CALLED SORT OF CONSEQUENTIAL, YOU KNOW, STEPS LIKE INVESTIGATION, GOVERNANCE, LACK OF CONFIDENCE, ET CETERA, WHICH IS MORE THAN JUST THE DISCLOSURE OF THE TRUE STATE OF THE TRANSACTION OR THE FINANCIAL SITUATION, IS THAT COGNIZABLE. AND THAT'S WHERE -- YOU KNOW, I THINK THAT'S THE MOST INTERESTING PART OF THIS QUESTION. I'M GOING TO HAVE TO THINK ABOUT THIS MORE.

SO I WILL TAKE THE MATTER UNDER SUBMISSION, OBVIOUSLY, AND -- BUT I'VE RULED ON THE OTHER THREE THINGS, BUT I WILL TAKE THIS MATTER UNDER SUBMISSION, AND WE'LL GET OUT AN ORDER AS QUICKLY AS I CAN.

THANK YOU FOR YOUR ARGUMENTS. IT'S BEEN ENLIGHTENING. APPRECIATE IT.

MR. PORRITT: THANK YOU, YOUR HONOR.

(PROCEEDINGS ADJOURNED AT 2:45 P.M.)

STATE OF CALIFORNIA)
) SS
COUNTY OF CONTRA COSTA)

I HEREBY CERTIFY THAT THE FOREGOING IN THE WITHIN-ENTITLED CAUSE WAS TAKEN AT THE TIME AND PLACE HEREIN NAMED; THAT THE TRANSCRIPT IS A TRUE RECORD OF THE PROCEEDINGS AS REPORTED BY ME, A DULY CERTIFIED SHORTHAND REPORTER AND A DISINTERESTED PERSON, AND WAS THEREAFTER TRANSCRIBED INTO TYPEWRITING BY COMPUTER.

I FURTHER CERTIFY THAT I AM NOT INTERESTED IN THE OUTCOME OF THE SAID ACTION, NOR CONNECTED WITH, NOR RELATED TO ANY OF THE PARTIES IN SAID ACTION, NOR TO THEIR RESPECTIVE COUNSEL.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND THIS 25TH DAY OF AUGUST, 2022.

jmcolumbini

JOAN MARIE COLUMBINI, CSR NO. 5435
STATE OF CALIFORNIA